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FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**

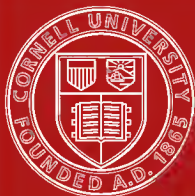
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**A manual of criminal law, including the m**



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A MANUAL  
OF  
CRIMINAL LAW,

INCLUDING THE MODE OF PROCEDURE BY WHICH  
IT IS ENFORCED.

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ESPECIALLY DESIGNED FOR THE  
USE OF STUDENTS.

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BY  
EMORY WASHBURN, LL. D.,  
AUTHOR OF "A TREATISE UPON THE AMERICAN LAW OF REAL PROPERTY," ETC.

---

EDITED, WITH NOTES, BY  
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"A TREATISE ON THE LAW OF FIXTURES," ETC.

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## AUTHOR'S PREFACE.

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The purpose and intent in preparing the treatise which is here offered, was to place in the hands of students of law an elementary outline of the criminal law, together with the mode of procedure by which the same is enforced, in a brief and intelligible form, with those parts eliminated which involve, on the one hand, theoretical and philosophical discussions and distinctions, and on the other, the refined and technical distinctions to which questions growing out of the criminal law have given rise. The object at which it aims is to present, in an intelligible form, so much of the familiar and well settled principles of these departments of the law as shall prepare the mind of the student for taking up the entire subject in detail, by showing in advance the topics embraced in it, and the relations they hold to each other. If it shall have accomplished what it was designed to do, it may serve the student the purposes of an outline map of the country he is to travel over, showing him the points to which his attention should be directed, and the

relation of the objects to each other, which he is to study and examine. The mode in which it has been sought to accomplish this purpose, has been to describe, in the first place, the principal crimes known to the law, as well as the principle upon which their character for criminality rests, and then to take up and describe, step by step, the processes by which prosecutions for offenses are begun, and carried on to final judgment. To do this, involves the inquiry as to the proper functionaries and courts by whom these are carried on, including magistrates, officers, jurors, the form of complaints and indictments, the service of official precepts, the impaneling of juries, and the rules to be observed in the trials of causes. In connection with these, the student should become somewhat familiar with the incidents of these trials, the distinctive provinces of jurisdiction of courts and juries, the modes of correcting errors and mistakes in the administration of either, and the rights of parties and their counsel in the conduct of causes, and the revision of the judgments which may be rendered therein.

As the readiest means of accomplishing this end, the present treatise assumes to illustrate these various matters by tracing a criminal prosecution from its incipient stage, a complaint before a magistrate, to its final judgment and sentence, treat-

ing each of its several stages in such a manner as to present the more prominent topics of inquiry which are likely to arise in the practical application of the rules of law and practice applicable to such cases.

The plan of the work disclaims anything like the comprehension or completeness of the larger treatises which are already familiar to the profession. It is an outline only, and pretends to no higher place. What it does aim at, is to give a student a general view of what composes the system of criminal law and procedure, within a convenient space—introductory to a study of these in detail, as leisure and opportunity may offer. The study of the criminal law necessarily involves a good deal of detail which requires special, and more or less, elaborate research, which is called for in the preparation of particular cases, rather than the storing up these in memory by a course of systematic reading.

The frequent citation of the work of Mr. Chitty upon the various topics treated of herein, indicates what becomes obvious, as it proceeds, that the plan of the present treatise has been borrowed from his far more elaborate "Practical Treatise on the Criminal Law." Free use, too, has been made of the treatises of Dr. Wharton and of Mr. Bishop, whose authority is too well established to be ques-

tioned, while the older works of Foster, Hale and Hawkins have not been ignored, and the later English treatises on criminal law, as well as Mr. Greenleaf's work on Evidence, have been referred to, at times, as tests of what is to be accepted as the modern doctrines of the English and American law. These, together with the reports of decided cases, have been the sources of what is here laid down as elementary law, and if its scope may seem limited, it has aimed to be accurate and reliable, so far as it covers the ground it is intended to occupy.

EMORY WASHBURN.

CAMBRIDGE, 1877.

## EDITOR'S PREFACE.

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The scope and purpose of this work are sufficiently stated in the author's preface. The manuscript of the work, as it was left by the learned author, was in substantially the same form as it appears in the ensuing pages; and that it was substantially complete, and in the form intended by the author, will, it is believed, appear from an examination of the work. The only changes not indicated in the text and notes, consist in the correction of mere verbal inaccuracies and errors in citations. Where any additions have been made to the text, the new matter has been inclosed within brackets, thus: [ ]. Additions to the notes have been indicated in the same manner, except where they consisted merely in the citation of additional authorities, in which case they have not always been distinguished from those cited by the author. The aim of the editor has not been to make an exhaustive citation of

[vii]

authorities upon any of the points stated, but merely to give such additional references to reported cases and statutes, as should make the work more useful to students of law, for whose use the work is especially designed.

MARSHALL D. EWELL.

UNION COLLEGE OF LAW, CHICAGO, '  
March 11, 1878.

# CONTENTS.

---

## CHAPTER I.

	PAGE
ELEMENTARY PRINCIPLES OF CRIMINAL LAW, .	1-18

## CHAPTER II.

CRIMES AND THEIR CLASSIFICATION, . . .	19-103
Affray, . . . . .	25
Arson, . . . . .	25
Assault and Battery, . . . . .	27
Barratry, . . . . .	28
Champerty, . . . . .	29
Maintenance, . . . . .	31
Bribery, . . . . .	33
Burglary, . . . . .	33
Cheats, . . . . .	37
False Pretenses, . . . . .	37
Conspiracy, . . . . .	41
Counterfeiting, . . . . .	44
Embezzlement, . . . . .	47
Forcible Entry and Detainer, . . .	51
Forgery, . . . . .	53
Larceny, . . . . .	56
Receiving Stolen Goods, . . . . .	66
Libel, . . . . .	66

	PAGE
Malicious Mischief, . . . . .	72
Murder, . . . . .	73
Manslaughter, . . . . .	80
Nuisance, . . . . .	85
Perjury, . . . . .	88
Subornation of Perjury, . . . . .	92
Riots, Routs, Unlawful Assemblies, .	93
Robbery, . . . . .	96
Treason, . . . . .	98
Accessories, . . . . .	101, 162
Limitations, . . . . .	102
Attempts, . . . . .	102

### CHAPTER III.

#### CRIMINAL PROCEDURE, . . . . . 104—268

##### I.—Complaints before Examining Magistrates, and Proceedings thereon, 104—118

##### II.—Indictments and Informations, and Proceedings thereon Prior to the Trial, . . . . . 118—205

Grand Juries, . . . . . 120

Arraignment and Plea, . . . . . 127, 191

Requisites of Indictments, . . . . . 133

Separate Counts—Joinder of Offenses, 153

Joinder of Defendants, . . . . . 160

Accessories, . . . . . 101, 162

Indictments upon Statutes, . . . . . 164

Matters of Description and Surplusage, 169

Amendments, . . . . . 170



	PAGE
How one Indicted is held to Answer—	
Forfeiture of Recognizance, . . . .	170
Remedy of the Bail, . . . . .	172
Capias, . . . . .	173
Arrest, . . . . .	174
Requisitions—Extradition, . . . .	185
Prisoner's right to Copy of Indictment	
and Counsel, . . . . .	187
Right to Call Witnesses, . . . .	189
List of Jurors and Witnesses, .	190
Presence of Accused, . . . . .	190
Arraignment and Plea, . . . . .	127, 191
Once in Jeopardy, . . . . .	195
Pardon, . . . . .	203
<i>Nol. Pros.</i> , . . . . .	204
Not Guilty, . . . . .	205
III.—The Trial and its Incidents, . .	205–255
Separate Trials, . . . . .	205
Competency of Defendants as Wit-	
nesses, . . . . .	208
Election upon which Count to Proceed,	209
Impanelling the Jury—Challenges, .	210
Oath of the Jury, . . . . .	217
Jury as Judges of the Law, . . .	218, 244
Reading of Indictment, . . . . .	219
Talesmen, . . . . .	219
View, . . . . .	219
Proceedings upon the Trial—Criminal	
Evidence, . . . . .	220
Argument of Counsel—Right of Jury	
to render a General Verdict, . . .	244

	PAGE
Publication of Proceedings — Con-	
tempts, . . . . .	246
Charge to the Jury, . . . . .	248
Verdict, . . . . .	250
Custody of the Jury—Effect of Sepa-	
ration, . . . . .	252
Discharge of the Jury, . . . . .	254
Custody of Jury, . . . . .	255
Effect of General Verdict of Guilty	
where some of the Counts are bad .	255
IV.—Proceedings Subsequent to the Ver-	
dict, . . . . .	256-264
Motion for New Trial, . . . . .	256
Review upon Exceptions to Rulings	
of Judge, . . . . .	258
Motions in Arrest of Judgment, . .	258
Benefit of Clergy, . . . . .	260
Sentence, . . . . .	260
Writ of Error, . . . . .	263
V.—Criminal Procedure in the Federal	
Courts, . . . . .	264-267
VI.—Impeachment, . . . . .	267, 268

## CASES CITED.

---

	PAGE
Adams <i>v.</i> People . . . . .	139
Alden <i>v.</i> Patterson . . . . .	33
Alderman <i>v.</i> French . . . . .	68, 70
Allen <i>v.</i> Martin . . . . .	182, 183
Anderson <i>v.</i> Dunn . . . . .	247
<i>v.</i> Radcliff . . . . .	30
Andrews <i>v.</i> The People . . . . .	250
Attorney General <i>v.</i> Bulpit . . . . .	242
Aubert <i>v.</i> Maze . . . . .	8
Austin <i>v.</i> Culpepper . . . . .	68
Aylesworth <i>v.</i> The People . . . . .	116
Barden <i>v.</i> Crocher . . . . .	139
Barnard <i>v.</i> Bartlett . . . . .	182
Barnes <i>v.</i> Harris . . . . .	238
Batthews <i>v.</i> Galindo . . . . .	235
Baxter <i>v.</i> The People . . . . .	12, 102
Beamon <i>v.</i> Ellice . . . . .	242
Bell <i>v.</i> Farrar . . . . .	62
<i>v.</i> Mallory . . . . .	94
<i>v.</i> State . . . . .	202
Benson <i>v.</i> Monson & Brimfield Mfg. Co. . . . .	23
Bergen <i>v.</i> The People . . . . .	190
Bill <i>v.</i> The People . . . . .	249
Bixby <i>v.</i> The State . . . . .	206, 207, 212
Blatch <i>v.</i> Archer . . . . .	181
Bloss <i>v.</i> Tobey . . . . .	26, 135
Bodwell <i>v.</i> Osgood . . . . .	72
Bolun <i>v.</i> People . . . . .	159
Booth <i>v.</i> Commonwealth . . . . .	156, 157

	PAGE
Boston, &c., R. R. <i>v.</i> Dana . . . . .	2
Brant <i>v.</i> Fowler . . . . .	255
Brennan <i>v.</i> The People . . . . .	12, 102
Brister <i>v.</i> The State . . . . .	213
Brobston <i>v.</i> Cahill . . . . .	230
Brooks <i>v.</i> Commonwealth . . . . .	178
<i>v.</i> Montague . . . . .	69
Brown <i>v.</i> Croome . . . . .	69
<i>v.</i> Commonwealth . . . . .	134, 165, 255
<i>v.</i> The People . . . . .	85, 172
Bull <i>v.</i> Loveland . . . . .	243
Burdett <i>v.</i> Abbott . . . . .	247
Burk <i>v.</i> State . . . . .	156
Burrell <i>v.</i> Phillips . . . . .	253
Bushel's Case . . . . .	218
Carleton <i>v.</i> Commonwealth . . . . .	155, 156, 157, 209
Carmody <i>v.</i> The People . . . . .	167
Casc <i>v.</i> Johnson . . . . .	247
Chase <i>v.</i> The People . . . . .	20
Chess <i>v.</i> The State . . . . .	46
Chicago & N. W. R'wy Co. <i>v.</i> Peacock . . . . .	23
Chicago, Bur. & Quin. R. R. Co. <i>v.</i> Carter . . . . .	168
Chicago Dock Co. <i>v.</i> Foster . . . . .	62
Chilicothe F. R. & B. Co. <i>v.</i> Jameson . . . . .	238
Clark <i>v.</i> Keliher . . . . .	53
<i>v.</i> Binney . . . . .	67
Clemmens <i>v.</i> Conrad . . . . .	243
Clemmer <i>v.</i> The People . . . . .	165
Coates <i>v.</i> The People . . . . .	12, 102, 160
Cobb <i>v.</i> Lucas . . . . .	142
Commonwealth <i>v.</i> Abbott . . . . .	215
<i>v.</i> Adams . . . . .	131, 162, 164
<i>v.</i> Andrews . . . . .	62, 64, 162, 198, 204
<i>v.</i> Anthes . . . . .	215, 218, 245
<i>v.</i> Ashley . . . . .	165
<i>v.</i> Atwood . . . . .	170
<i>v.</i> Austin . . . . .	214
<i>v.</i> Ayer . . . . .	53
<i>v.</i> Bailey . . . . .	148

	PAGE
Commonwealth v. Baldwin . . . . .	54
v. Baring . . . . .	26
v. Battes . . . . .	132
v. Barlow . . . . .	12
v. Barnard . . . . .	140
v. Beaman . . . . .	59, 65, 125
v. Bean . . . . .	166
v. Blanding . . . . .	68, 69, 245
v. Blood . . . . .	107
v. Bond . . . . .	47
v. Bonner . . . . .	24, 68
v. Bosworth . . . . .	197, 226
v. Bowen . . . . .	76, 103
v. Bolkom . . . . .	166
v. Brady . . . . .	91
v. Brown . . . . .	158
v. Brickett . . . . .	172
v. Briggs . . . . .	204
v. Bulman . . . . .	146
v. Butterick . . . . .	48, 50
v. Buzzeil . . . . .	234
v. Cain . . . . .	155, 156
v. Call . . . . .	38, 246
v. Carey . . . . .	176, 177
v. Chace . . . . .	59
v. Chapman . . . . .	3, 10, 66
v. Child . . . . .	249
v. Clapp . . . . .	67, 72
v. Clifford . . . . .	96, 97
v. Cooley . . . . .	9, 180
v. Costello . . . . .	158
v. Collberg . . . . .	28
v. Costley . . . . .	77, 251
v. Crotty . . . . .	142, 180
v. Cummings . . . . .	140
v. Cunningham . . . . .	203
v. Dana . . . . .	103
v. Dascom . . . . .	193, 203
v. Davidson . . . . .	40

	PAGE
Commonwealth <i>v.</i> Davis . . . . .	29, 135
<i>v.</i> Douglass . . . . .	90, 92, 93
<i>v.</i> Drake . . . . .	239
<i>v.</i> Drew . . . . .	38, 39, 160
<i>v.</i> Drum . . . . .	159
<i>v.</i> Dudley . . . . .	52
<i>v.</i> Eastman . . . . .	209
<i>v.</i> Eaton . . . . .	154, 155
<i>v.</i> Eddy . . . . .	20
<i>v.</i> Field . . . . .	180, 181
<i>v.</i> Foster . . . . .	106
<i>v.</i> Fuller . . . . .	46
<i>v.</i> Gibbs . . . . .	6
<i>v.</i> Gillespie . . . . .	156
<i>v.</i> Goddard . . . . .	193, 203
<i>v.</i> Goodenough . . . . .	202, 205
<i>v.</i> Goodhue . . . . .	199
<i>v.</i> Green . . . . .	257
<i>v.</i> Griffin . . . . .	149, 164
<i>v.</i> Haley . . . . .	53
<i>v.</i> Halstat . . . . .	91
<i>v.</i> Harmon . . . . .	148
<i>v.</i> Harrington . . . . .	8, 145
<i>v.</i> Harris . . . . .	165, 166
<i>v.</i> Hawkins . . . . .	79
<i>v.</i> Hay . . . . .	48, 49, 50
<i>v.</i> Hearsay . . . . .	259
<i>v.</i> Heath . . . . .	20
<i>v.</i> Hersey . . . . .	147
<i>v.</i> Hill . . . . .	72, 130, 233
<i>v.</i> Hills . . . . .	156, 158
<i>v.</i> Hinds . . . . .	55, 132, 133
<i>v.</i> Holby . . . . .	134
<i>v.</i> Holden . . . . .	64
<i>v.</i> Holmes . . . . .	67, 148, 154, 159
<i>v.</i> Hope . . . . .	
<i>v.</i> Houghton . . . . .	148
<i>v.</i> Hoyt . . . . .	165
<i>v.</i> Horton . . . . .	131

	PAGE
Commonwealth <i>v. Hunt</i> . . . .	42, 43, 44, 134
<i>v. Hussey</i> . . . .	150, 197
<i>v. Irwin</i> . . . .	182
<i>v. James</i> . . . .	150, 206, 213
<i>v. Jennings</i> . . . .	168
<i>v. Johnson</i> . . . .	173
<i>v. Knapp</i> . . . .	6, 101, 160, 163, 191, 213, 220 224, 225, 226, 227, 239.
<i>v. Kimball</i> . . . .	21, 86
<i>v. King</i> . . . .	6, 48, 49, 50, 164
<i>v. Ladd</i> . . . .	55
<i>v. Lavery</i> . . . .	152
<i>v. Leach</i> . . . .	17, 106
<i>v. Lee</i> . . . .	176
<i>v. Lewis</i> . . . .	141
<i>v. Libby</i> . . . .	50
<i>v. Locke</i> . . . .	191
<i>v. Mahon</i> . . . .	170
<i>v. Marsh</i> . . . .	208
<i>v. Maxwell</i> . . . .	149, 168
<i>v. Merrill</i> . . . .	192, 193
<i>v. Merrifield</i> . . . .	50, 150
<i>v. McCool</i> . . . .	253
<i>v. McCulloch</i> . . . .	29
<i>v. McGahey</i> . . . .	177, 183
<i>v. McKie</i> . . . .	79
<i>v. McLaughlin</i> . . . .	177, 179
<i>v. McNeill</i> . . . .	172
<i>v. McPike</i> . . . .	224
<i>v. Morse</i> . . . .	152, 167
<i>v. Mortimer</i> . . . .	200
<i>v. Newburyport Bridge</i> . . . .	23
<i>v. Newell</i> . . . .	36
<i>v. North Brookfield</i> . . . .	137, 140
<i>v. Old Colony R. R.</i> . . . .	85
<i>v. O'Malley</i> . . . .	49
<i>v. Park</i> . . . .	220
<i>v. Parker</i> . . . .	77
<i>v. Parmenter</i> . . . .	148

	PAGE
Commonwealth <i>v.</i> Pease . . . . .	13
<i>v.</i> Peck . . . . .	236
<i>v.</i> Pemberton . . . . .	75
<i>v.</i> People . . . . .	160
<i>v.</i> Perkins . . . . .	107, 142
<i>v.</i> Peters . . . . .	199
<i>v.</i> Phillips . . . . .	107, 108
<i>v.</i> Pollard . . . . .	90, 93
<i>v.</i> Porter . . . . .	244
<i>v.</i> Pray . . . . .	135, 167
<i>v.</i> Price . . . . .	226
<i>v.</i> Purchase . . . . .	201, 254, 255
<i>v.</i> Quinn . . . . .	139
<i>v.</i> Rand . . . . .	63, 109
<i>v.</i> Randal . . . . .	28
<i>v.</i> Ray . . . . .	53, 54, 160
<i>v.</i> Richards . . . . .	150
<i>v.</i> Robinson . . . . .	207, 208, 209, 210
<i>v.</i> Roby . . . . .	52, 159, 195, 198, 199, 201 202, 251, 255
<i>v.</i> Rogers . . . . .	21, 213
<i>v.</i> Rumford Chem. Works . . . . .	9, 86
<i>v.</i> Runnels . . . . .	94
<i>v.</i> Sacket . . . . .	228
<i>v.</i> Sawtelle . . . . .	150
<i>v.</i> Silsbee . . . . .	6
<i>v.</i> Simpson . . . . .	48
<i>v.</i> Shanks . . . . .	235
<i>v.</i> Shattuck . . . . .	51, 52
<i>v.</i> Shedd . . . . .	44
<i>v.</i> Smart . . . . .	50
<i>v.</i> Smith . . . . .	58, 85, 125, 152
<i>v.</i> Snelling . . . . .	68, 69
<i>v.</i> Springfield . . . . .	140
<i>v.</i> Squire . . . . .	11, 159, 166, 199
<i>v.</i> Stark . . . . .	166
<i>v.</i> State . . . . .	164
<i>v.</i> Stearns . . . . .	48, 49
<i>v.</i> Stebbins . . . . .	172



	PAGE
Commonwealth <i>v.</i> Stephenson . . . . .	54
<i>v.</i> Stevenson . . . . .	36
<i>v.</i> Stevens . . . . .	148
<i>v.</i> Stewart . . . . .	62
<i>v.</i> Strause . . . . .	49
<i>v.</i> Symonds, . . . . .	154
<i>v.</i> Taylor . . . . .	148
<i>v.</i> Tarbox . . . . .	148
<i>v.</i> Thompson . . . . .	206
<i>v.</i> Thurber . . . . .	167
<i>v.</i> Tilton . . . . .	131, 132
<i>v.</i> Tobin . . . . .	178, 183
<i>v.</i> Tuck 146, 154, 155, 159, 163, 168, 204, 209	
<i>v.</i> Twombly . . . . .	213
<i>v.</i> Upton . . . . .	86
<i>v.</i> Uprichard . . . . .	64
<i>v.</i> Wade . . . . .	200, 201, 204
<i>v.</i> Walton . . . . .	191
<i>v.</i> Warren . . . . .	17, 37, 38
<i>v.</i> Webster . . . . .	79, 213, 230
<i>v.</i> Welsh . . . . .	165
<i>v.</i> Wilcox . . . . .	109
<i>v.</i> Willard . . . . .	243
<i>v.</i> Williams . . . . .	6, 230
<i>v.</i> Wood . . . . .	120
<i>v.</i> Wright . . . . .	148
<i>v.</i> Wyman . . . . .	48
<i>v.</i> York . . . . .	68, 79
Coates <i>v.</i> People . . . . .	12, 102, 160
Cobb <i>v.</i> Lucas . . . . .	142
Cochran <i>v.</i> Stewart . . . . .	62
Conkwright <i>v.</i> People . . . . .	227
Conraddy <i>v.</i> People . . . . .	185
Cook <i>v.</i> Hill . . . . .	72
Crandall <i>v.</i> Dawson . . . . .	93
Cross <i>v.</i> People . . . . .	226
Danforth <i>v.</i> Streeter . . . . .	30
DeBost <i>v.</i> Beresford . . . . .	67
Dennis <i>v.</i> People . . . . .	36

	PAGE
Dexter <i>v.</i> Spear . . . . .	67
Dickenson <i>v.</i> Dustin . . . . .	243
Dodds <i>v.</i> Board . . . . .	175
Dodge <i>v.</i> People . . . . .	260
Donahoe <i>v.</i> Shed . . . . .	179
Dougherty <i>v.</i> People . . . . .	94
Dougherty <i>v.</i> Commonwealth . . . . .	260
Dunn <i>v.</i> People . . . . .	226
Durfee <i>v.</i> Jones . . . . .	62
Dutell <i>v.</i> State . . . . .	125
Earp <i>v.</i> Lee . . . . .	85, 88
Ellis <i>v.</i> Kimball . . . . .	67
Ellis <i>v.</i> People . . . . .	230
Emerson <i>v.</i> Balch . . . . .	181
Estes <i>v.</i> Carter . . . . .	9
Fawcett <i>v.</i> Osborn . . . . .	62
Fellowe's Case . . . . .	251
Fetrow <i>v.</i> Merriweather . . . . .	31
Fifty Associates <i>v.</i> Howland . . . . .	52
Fisher <i>v.</i> People . . . . .	218, 249
Fitz Williams' Case . . . . .	135, 136
Flanagan <i>v.</i> People . . . . .	20, 21
Fossler <i>v.</i> Schriber . . . . .	237
Foster's Case . . . . .	111
Foster <i>v.</i> Pierce . . . . .	226
Foster <i>v.</i> Hall . . . . .	237, 238
Fox <i>v.</i> State of Ohio . . . . .	45, 46
Gardner <i>v.</i> People . . . . .	125, 126
Gates <i>v.</i> People . . . . .	214
Goltra <i>v.</i> Wolcott . . . . .	238
Gray <i>v.</i> People . . . . .	226
Grainger <i>v.</i> Hill . . . . .	174
Greschia <i>v.</i> People . . . . .	85
Green <i>v.</i> Commonwealth . . . . .	132
Guenther <i>v.</i> Whiteacre . . . . .	118
Hall <i>v.</i> Ashby . . . . .	30, 31
Hall <i>v.</i> Roche . . . . .	180
Halton <i>v.</i> Robinson . . . . .	238
Hamilton <i>v.</i> People . . . . .	112, 226, 239

	PAGE
Handcock v. Baker . . . . .	175
Hanscom v. Hanscom . . . . .	233
Harding's Case . . . . .	17
Harlan v. People . . . . .	46
Hawkins v. State . . . . .	206
Haynes' Case . . . . .	60
Hill v. State . . . . .	38
Hoch v. People . . . . .	10
Holley v. Mix . . . . .	176
Holmes v. Jennison . . . . .	187
Holmes ( <i>ex parte</i> ) . . . . .	187
Hope v. Commonwealth . . . . .	165
Hopkins v. Commonwealth . . . . .	165
Hooker v. State . . . . .	151, 214
Hopps v. People . . . . .	20, 227
Horton v. Horton . . . . .	253
Hoskins v. Tarrance . . . . .	58
Housh v. People . . . . .	108
Hubbard v. Mace . . . . .	183
Hurd v. People . . . . .	83
Hutchinson v. Birch . . . . .	183
Hyatt v. Adams . . . . .	2
Iowa v. Brandt . . . . .	121
Jackson v. State . . . . .	58
Jennings v. Commonwealth . . . . .	9
Johnson v. People . . . . .	206
Johnson v. State . . . . .	226
Joselyn v. Commonwealth . . . . .	155, 156, 157, 209, 255
Jupirtz v. People . . . . .	227
Jumpertz v. People . . . . .	230, 253, 254
Kane v. People . . . . .	156, 157
Kelly v. Drew . . . . .	235
Kelley v. State . . . . .	260
Kelley v. People . . . . .	126
Kellogg v. State . . . . .	40
Kendal v. May . . . . .	232
Kennedy v. Brown . . . . .	33
Kennedy v. People . . . . .	12, 102
Kerwin v. Hill . . . . .	230

	PAGE
Key <i>v.</i> Vattier . . . . .	9, 30
Kibs <i>v.</i> People . . . . .	49
King <i>v.</i> Mawbey . . . . .	91
Kindred <i>v.</i> Stitt . . . . .	175
Langdon ( <i>ex parte</i> ) . . . . .	248
Lathrop <i>v.</i> Amherst Bank . . . . .	29, 30, 31, 32
Lee <i>v.</i> Gansel . . . . .	184
Leindecker <i>v.</i> Wa'dron . . . . .	237
Lequeat <i>v.</i> People . . . . .	168
Lewis <i>v.</i> Bell . . . . .	31
Lewis <i>v.</i> Welch . . . . .	8
Lindsay <i>v.</i> People . . . . .	226
Low's Case . . . . .	125, 126
Long's Case . . . . .	136
Lynch <i>v.</i> People . . . . .	168
Marsh <i>v.</i> Smith . . . . .	175
Martin <i>v.</i> People . . . . .	159, 206, 207
Matter of Jerry Irwin . . . . .	118
Mattison <i>v.</i> State . . . . .	45, 46
Mask <i>v.</i> State . . . . .	161
Maton <i>v.</i> People . . . . .	206, 212
McCreary <i>v.</i> Commonwealth . . . . .	253
McCue <i>v.</i> Commonwealth . . . . .	260
McCutcheon <i>v.</i> People . . . . .	165
McGowan <i>v.</i> State . . . . .	216
McIntyre <i>v.</i> People . . . . .	250
McKinney <i>v.</i> People . . . . .	128, 253, 254
McLain <i>v.</i> State . . . . .	2 3
McMahan <i>v.</i> Bowe . . . . .	31
McNaghten's Case . . . . .	20, 21
McNamee <i>v.</i> People . . . . .	262
Mead <i>v.</i> City of Boston . . . . .	26
Meador <i>v.</i> Stone . . . . .	52
Meister <i>v.</i> People . . . . .	2, 6
Merchants Bank <i>v.</i> Cook . . . . .	10
Merwin <i>v.</i> People . . . . .	143, 149
Metzker <i>v.</i> People . . . . .	168
Michigan Cent. R. R. Co. <i>v.</i> Phillips . . . . .	62
Miner <i>v.</i> People . . . . .	208

	PAGE
Minet <i>v.</i> Morgan . . . . .	239
Mohler <i>v.</i> People . . . . .	165, 264
Moody <i>v.</i> Rowley . . . . .	230
Moore <i>v.</i> State of Illinois . . . . .	99
Morris <i>v.</i> Bruckley . . . . .	249
Morrison <i>v.</i> State . . . . .	227
Morrissey <i>v.</i> People . . . . .	64
Morrell <i>v.</i> People . . . . .	89, 90
Morrow <i>v.</i> Wood . . . . .	28
Mowry <i>v.</i> Chase . . . . .	174
Mullinix <i>v.</i> People . . . . .	159
Murphy <i>v.</i> People . . . . .	80
Myers <i>v.</i> People . . . . .	167
Nash <i>v.</i> State . . . . .	190
Newkirk <i>v.</i> Cone . . . . .	
Nias <i>v.</i> N. & E. R. R. Co. . . . .	239
Nicholls <i>v.</i> Ingersol . . . . .	172
Nomaque <i>v.</i> People . . . . .	125, 251
Nolan <i>v.</i> People . . . . .	36
O'Connel <i>v.</i> Queen . . . . .	158
Ohio & M. R. R. Co. <i>v.</i> Kerr . . . . .	62
Omichund <i>v.</i> Baker . . . . .	234
Ortwin <i>v.</i> Commonwealth . . . . .	20
Pardee <i>v.</i> Smith . . . . .	112
Pate <i>v.</i> People . . . . .	230
Patten <i>v.</i> People . . . . .	83
Pearce <i>v.</i> Atwood . . . . .	179, 181
People <i>v.</i> Babcock . . . . .	37, 38
<i>v.</i> Bill . . . . .	208
<i>v.</i> Barker . . . . .	237
<i>v.</i> Barret . . . . .	149
<i>v.</i> Cage . . . . .	201
<i>v.</i> Doyle . . . . .	226
<i>v.</i> Douglass . . . . .	253
<i>v.</i> Garbutt . . . . .	20
<i>v.</i> Goodwin . . . . .	201
<i>v.</i> Holbrook . . . . .	228
<i>v.</i> Howell . . . . .	207
<i>v.</i> Keys . . . . .	214

	PAGE
People <i>v.</i> Liscomb . . . . .	158
<i>v.</i> Lynch . . . . .	99, 108
<i>v.</i> Maloney . . . . .	60
<i>v.</i> McKinney . . . . .	91
<i>v.</i> Ransom . . . . .	253
<i>v.</i> Rathbun, . . . . .	250
<i>v.</i> Spooner . . . . .	230
<i>v.</i> Whitson . . . . .	159, 170, 263
<i>v.</i> Wilson . . . . .	247
<i>v.</i> Williams . . . . .	64
Peri <i>v.</i> People . . . . .	80
Petrie <i>v.</i> People . . . . .	248
Pierce <i>v.</i> State . . . . .	214
Pichell <i>v.</i> Watson . . . . .	32
Podree <i>v.</i> McWilliams . . . . .	242
Pollard <i>v.</i> People . . . . .	90
Pond <i>v.</i> People . . . . .	83, 85
Putnam <i>v.</i> Wadley . . . . .	230
Rainey <i>v.</i> People . . . . .	126
Radcliff <i>v.</i> Barton . . . . .	183
Rafferty <i>v.</i> People . . . . .	77, 81, 179
Ray <i>v.</i> State . . . . .	226
Regina <i>v.</i> Ewington . . . . .	89
<i>v.</i> Downing . . . . .	59
<i>v.</i> Frost . . . . .	213
<i>v.</i> Goddard . . . . .	195
<i>v.</i> Hill . . . . .	232
<i>v.</i> Railway . . . . .	23
Rex <i>v.</i> Berry . . . . .	194
<i>v.</i> Bourne . . . . .	264
<i>v.</i> Clement . . . . .	246
<i>v.</i> Colby . . . . .	242
<i>v.</i> Crowhnrst . . . . .	135
<i>v.</i> Dean St. Asaph . . . . .	245
<i>v.</i> Davidson . . . . .	247
<i>v.</i> Dyson* . . . . .	130, 194
<i>v.</i> Dowlin . . . . .	219
<i>v.</i> Farrington . . . . .	149
<i>v.</i> Forsyth . . . . .	152

	PAGE
Rex <i>v.</i> Gibson . . . . .	192, 195
<i>v.</i> Granger . . . . .	129, 193
<i>v.</i> Hall . . . . .	97
<i>v.</i> Holloway . . . . .	151
<i>v.</i> Jackson . . . . .	39
<i>v.</i> Jervis . . . . .	164
<i>v.</i> Kinnersley . . . . .	161
<i>v.</i> Phillips . . . . .	206
<i>v.</i> Price . . . . .	22
<i>v.</i> Pritchard . . . . .	194
<i>v.</i> Johnson . . . . .	195
<i>v.</i> Rudd . . . . .	225
<i>v.</i> Smith . . . . .	208
<i>v.</i> Sudbury . . . . .	161
<i>v.</i> Turner . . . . .	163
<i>v.</i> Vaughan . . . . .	33
<i>v.</i> Whitehead . . . . .	135
<i>v.</i> Woodfall . . . . .	69
Rice <i>v.</i> People . . . . .	153
Richardson <i>v.</i> People . . . . .	190, 231
Richardson <i>v.</i> Newcomb . . . . .	230
Rickets <i>v.</i> Solway . . . . .	170
Roach <i>v.</i> People . . . . .	83
Rohan <i>v.</i> Sawin . . . . .	176
Rollins <i>v.</i> Ames . . . . .	216
Ropp <i>v.</i> Barber . . . . .	251
Rouse <i>v.</i> State . . . . .	45
Russell <i>v.</i> People . . . . .	253, 254
Schoeffler <i>v.</i> Staté . . . . .	206, 212
Schnier <i>v.</i> People . . . . .	218
Sesemon <i>v.</i> State . . . . .	46
Shannon <i>v.</i> People . . . . .	12, 162
Simons <i>v.</i> Gratz . . . . .	240
Simpson <i>v.</i> Lamb . . . . .	30
Smith <i>v.</i> Donnelly . . . . .	175
<i>v.</i> State . . . . .	9
Stanley <i>v.</i> Jones . . . . .	30
Stack <i>v.</i> People . . . . .	159
State <i>v.</i> Allen . . . . .	167

	PAGE
State <i>v.</i> Antonio . . . . .	46
<i>v.</i> Bartlett . . . . .	6, 64
<i>v.</i> Bielby . . . . .	167
<i>v.</i> Buck . . . . .	152
<i>v.</i> Clemens, . . . . .	226
<i>v.</i> Farr . . . . .	129, 193
<i>v.</i> Fuller . . . . .	158
<i>v.</i> Gigher . . . . .	206
<i>v.</i> Great Milk Co. . . . .	23
<i>v.</i> Gummer . . . . .	167
<i>v.</i> Harden . . . . .	251
<i>v.</i> Harris . . . . .	151
<i>v.</i> Hodgkins . . . . .	199
<i>v.</i> Howard . . . . .	226
<i>v.</i> Hunter . . . . .	206
<i>v.</i> Kay . . . . .	253
<i>v.</i> Little . . . . .	203
<i>v.</i> Lynch . . . . .	99
<i>v.</i> Martin . . . . .	198
<i>v.</i> Marvin . . . . .	206
<i>v.</i> McPherson . . . . .	46
<i>v.</i> McCord . . . . .	198
<i>v.</i> Mooney . . . . .	203
<i>v.</i> Nash . . . . .	206
<i>v.</i> Nelson . . . . .	154
<i>v.</i> Noble . . . . .	170
<i>v.</i> Patterson , . . . .	79, 83, 85
<i>v.</i> Prescott . . . . .	253
<i>v.</i> Shoemaker . . . . .	45
<i>v.</i> Soper . . . . .	206, 207
<i>v.</i> Smith . . . . .	182
<i>v.</i> Taylor . . . . .	59
<i>v.</i> Underwood . . . . .	64
<i>v.</i> Vance . . . . .	83
<i>v.</i> Wall , . . . . .	216
<i>v.</i> Williamson . . . . .	137
<i>v.</i> Wilson . . . . .	254
Stewart <i>v.</i> Jessup . . . . .	139
Stearns <i>v.</i> Sampson . . . . .	53



	PAGE
Stetson <i>v.</i> Parker . . . . .	110
St. Louis A. & C. R. R. Co. <i>v.</i> Dalby . . . . .	23
Story <i>v.</i> People . . . . .	246, 247
Stratton <i>v.</i> Commonwealth . . . . .	134, 135
Streeter <i>v.</i> People . . . . .	87
Thomas <i>v.</i> Sorrell . . . . .	8
Thompson <i>v.</i> Reynolds . . . . .	29
Thurston <i>v.</i> Percival . . . . .	30
<i>v.</i> Moore . . . . .	46
<i>v.</i> Whitney . . . . .	233
Topham's Case . . . . .	69
Trial of British Soldiers . . . . .	15
Tulley <i>v.</i> Commonwealth . . . . .	165
Turns <i>v.</i> Commonwealth . . . . .	125
United States <i>v.</i> Batchelder . . . . .	167
<i>v.</i> Conner . . . . .	266
<i>v.</i> Coolidge . . . . .	9
<i>v.</i> Elliott . . . . .	169
<i>v.</i> Gilbert . . . . .	194, 266
<i>v.</i> Harding . . . . .	266
<i>v.</i> Hudson . . . . .	9
<i>v.</i> Macomb . . . . .	266
<i>v.</i> Marchant . . . . .	206, 207
<i>v.</i> Marigold . . . . .	46
Van Dusen <i>v.</i> People . . . . .	89
Van Wyck <i>v.</i> McIntosh . . . . .	230
Vinton <i>v.</i> Peck . . . . .	230
Waddy <i>v.</i> Thompson . . . . .	57
Wakely <i>v.</i> Hart . . . . .	176
Wallis <i>v.</i> Mease . . . . .	59
Walsh <i>v.</i> People . . . . .	227
Ware <i>v.</i> Judah . . . . .	151
Warriner <i>v.</i> People . . . . .	165
Weakly <i>v.</i> Hall . . . . .	3
Welden <i>v.</i> Burch . . . . .	243
Webster's Case . . . . .	125
Wheeler <i>v.</i> Lynch . . . . .	54
White <i>v.</i> People . . . . .	206, 208
Wilbur <i>v.</i> Flood . . . . .	243

	PAGE
Willis <i>v.</i> Watson . . . . .	31
Williams <i>v.</i> Prothero . . . . .	31
Williams <i>v.</i> Spencer . . . . .	184
Wilson <i>v.</i> Abrams . . . . .	255
Wilmarth <i>v.</i> Burt . . . . .	179
Wilmons <i>v.</i> Bank of Illinois . . . . .	264
Winsor <i>v.</i> Queen . . . . .	201
Winneshiek Ins. Co. <i>v.</i> Schneller . . . . .	216
Wonson <i>v.</i> Sayward . . . . .	60, 144
Wonson <i>v.</i> Queen . . . . .	254
Wood <i>v.</i> Downes . . . . .	30
Wood <i>v.</i> People . . . . .	90
Wood <i>v.</i> Smith . . . . .	63
Wood <i>v.</i> Thornby . . . . .	237
Wrecklege <i>v.</i> State . . . . .	167
Wright <i>v.</i> Meek . . . . .	30
Yates <i>v.</i> Lansing . . . . .	247
Yundt <i>v.</i> People . . . . .	126, 188
Zschocke <i>v.</i> People . . . . .	49

# TEXT BOOKS, STATUTES, ETC., CITED.

	PAGE
Abbott U. S. Courts Practice . . . . .	265, 266
Albany Law Journal . . . . .	185, 194
Amos' Science of Law . . . . .	2, 7
American Jurist . . . . .	187, 189, 236, 244
——— Law Register . . . . .	40, 226, 268
——— Law Review . . . . .	137
——— Reports . . . . .	77, 143, 149
Angell & Ames on Corporations . . . . .	23
Archibold's Criminal Practice and Pleadings . . . . .	11, 151, 209
Bannister on Moral Insanity . . . . .	22
Barrington's Statutes . . . . .	10, 134
Bishop's Criminal Law, 3, 6, 7, 9, 10, 12, 13, 14, 19, 22, 23, 24, 25, 26, 28, 29, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 43, 44, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 69, 70, 72, 73, 75, 76, 87, 89, 90, 96, 97, 101, 102, 103, 163, 196.	
Bishop's Criminal Procedure, 95, 107, 109, 119, 121, 125, 126, 127, 128, 130, 131, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147, 149, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 169, 170, 172, 174, 176, 177, 180, 181, 183, 184, 185, 190, 192, 195, 205, 207, 212, 213, 214, 215, 216, 217, 218, 219, 221, 225, 226, 228, 245, 249, 252, 253, 258, 259, 260, 262, 263, 264.	
Bishop's Statutory Crimes . . . . .	10
Blackstone's Commentaries, 2, 3, 4, 6, 7, 8, 10, 12, 13, 14, 22, 25, 26, 27, 28, 32, 33, 34, 35, 36, 48, 49, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 70, 75, 76, 77, 78, 80, 82, 85, 86, 88, 89, 90, 91, 99, 100, 120, 130, 131, 132, 134, 138,	

	PAGE
174, 175, 176, 178, 183, 184, 188, 189, 212, 213, 214, 216, 248.	
Broom & Hadley's Commentaries, 3, 7, 14, 18, 19, 21, 22, 27, 28, 33, 35, 36, 37.	
Bréese (Ill. Rep.) . . . . .	125, 251
Burn's Justice . . . . .	105
Carpenter's Mental Physiology . . . . .	21
Chitty's Criminal Law, 6, 11, 12, 13, 43, 44, 51, 52, 58, 59, 74, 76, 77, 78, 89, 90, 91, 94, 95, 96, 97, 102, 107, 109, 110, 111, 112, 114, 117, 119, 120, 121, 122, 124, 129, 130, 131, 132, 133, 134, 135, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 155, 156, 157, 160, 161, 162, 163, 164, 165, 167, 168, 169, 170, 172, 173, 175, 176, 177, 178, 180, 181, 182, 183, 188, 189, 190, 191, 192, 193, 194, 195, 197, 198, 199, 200, 202, 203, 204, 205, 207, 208, 209, 212, 213, 214, 215, 216, 217, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 246, 248, 251, 252, 253, 254, 255, 257, 258, 259, 261, 262, 264.	
Chitty on Pleading . . . . .	136
Chicago Journal Nervous and Mental Diseases . . . . .	22
Chicago Legal News . . . . .	49, 203
Clark & Finnely Rep. . . . .	157
Coke on Littleton . . . . .	255
Coke, Institutes, . . . . . 33, 34, 58, 74, 77, 89, 90, 91, 94, 96, 142	
Comyn's Digest . . . . .	105, 119, 121
Cooley's Constitutional Limitations, 17, 18, 46, 64, 69, 70, 72, 93, 108, 189, 195, 196, 233, 243, 247, 261.	
Crown Circuit Companion, 134, 135, 138, 143, 144, 145, 149, 153, 173, 209.	
Dane's Abridgment . . . . .	105, 174, 178, 213, 215, 217
Deuteronomy . . . . .	4
Deacon's Criminal Law . . . . .	88
East's Pleas of the Crown, 25, 26, 27, 34, 35, 36, 53, 54, 55, 56, 62, 63, 75, 80, 81, 83, 84, 96, 97, 144, 147, 148, 149, 152, 155, 160, 202.	
East's Criminal Law . . . . .	26, 37, 38, 39, 74, 75, 76, 97, 153, 184
Eden's Penal Law . . . . .	7, 188, 190, 191
Edinburg Review . . . . .	16

	PAGE
Ewell's Leading Cases . . . . .	20, 21
Ewell on Fixtures . . . . .	58, 59
Foster on Criminal Law, 74, 82, 83, 84, 97, 162, 164, 181, 182	
Georgia Revised Code . . . . .	58
Greenleaf on Evidence, 42, 44, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 67, 68, 70, 71, 72, 74, 77, 81, 82, 85, 86, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 100, 101, 102, 126, 147, 170, 222, 223, 224, 228, 229, 230, 232, 233, 234, 235, 236, 238, 239, 240, 241, 242, 243, 250.	
Hale's Pleas of the Crown, 5, 22, 32, 58, 61, 62, 63, 74, 75, 76, 77, 80, 81, 82, 83, 84, 96, 100, 111, 133, 137, 138, 140, 141, 142, 143, 144, 145, 149, 152, 160, 162, 175, 177, 178, 182, 183, 185, 192, 213, 217, 219.	
Hargrave's State Trials . . . . .	189, 223
Hawkins' Pleas of the Crown, 8, 22, 25, 27, 29, 33, 44, 51, 52, 88, 92, 94, 95, 165, 180, 182, 183, 185.	
Iowa Code, 11, 26, 27, 31, 33, 38, 45, 47, 55, 56, 60, 65, 66, 67, 69, 70, 72, 73, 78, 87, 88, 92, 98, 100, 102, 106, 107, 109, 110, 112, 113, 117, 141, 206, 212.	
Iowa Revised Laws . . . . .	11
Illinois Constitution, 69, 70, 93, 119, 120, 189, 190, 204, 261, 262.	
Illinois Revised Statutes, 2, 7, 11, 12, 13, 14, 17, 19, 22, 24, 25, 26, 27, 28, 29, 32, 33, 34, 38, 40, 43, 45, 47, 48, 49, 51, 54, 55, 56, 57, 58, 59, 60, 64, 65, 66, 67, 69, 70, 71, 72, 73, 76, 77, 78, 79, 80, 82, 84, 85, 87, 88, 92, 94, 96, 98, 100, 102, 103, 106, 107, 108, 109, 110, 111, 112, 116, 117, 118, 120, 121, 122, 123, 125, 126, 130, 131, 132, 133, 136, 141, 143, 153, 161, 165, 172, 173, 175, 177, 181, 187, 188, 189, 191, 194, 208, 212, 214, 217, 218, 222, 234, 236, 240, 244, 245, 249, 250, 251, 255, 257, 258, 260, 261, 262, 263, 264.	
Indiana Revised Laws . . . . .	9
Jacobs' Law Dictionary . . . . .	10, 192
Jones', Sir William, Works . . . . .	122
Kame's Historical Law Tracts . . . . .	5
Krafft Ebing, Gerichtlicher Psychopathologie! . . . .	21
Law Review (London) . . . . .	15, 113, 157
Law Reporter . . . . .	232, 239
Maudsley. Physiclogy and Pathology of the Mind . . .	22

	PAGE
Massachusetts Bill of Rights, 12, 17, 139, 189, 190, 223, 231, 261.	
Massachusetts Constitution . . . . .	93, 98, 204
Massachusetts General Statutes, 2, 11, 12, 13, 23, 25, 26, 27, 28, 33, 34, 36, 37, 38, 45, 47, 48, 51, 54, 55, 56, 58, 60, 65, 66, 70, 71, 72, 73, 74, 75, 78, 81, 82, 89, 92, 94, 96, 97, 98, 100, 102, 103, 105, 106, 107, 109, 110, 111, 113, 115, 116, 117, 119, 120, 121, 122, 123, 126, 129, 131, 138, 139, 143, 147, 153, 154, 159, 162, 163, 169, 172, 173, 177, 178, 180, 181, 188, 189, 190, 191, 194, 199, 200, 208, 211, 212, 214, 215, 216, 217, 218, 219, 220, 231, 233, 234, 236, 245, 249, 257, 258, 259, 262, 264.	
May's Constitutional History . . . . .	189
Michigan Compiled Laws, 11, 12, 26, 27, 30, 31, 33, 38, 45, 47, 51, 54, 55, 56, 60, 64, 65, 66, 73, 74, 78, 88, 94, 96, 98, 102, 103, 106, 108, 109, 110, 111, 112, 113, 116, 117, 119, 131, 141, 143, 153, 169, 208, 234, 236, 240, 262.	
Michigan Constitution . . . . .	69, 70, 72, 98, 100, 233, 245
Michigan Session Laws . . . . .	48
Michigan Territorial Laws . . . . .	17
Moore's Criminal Law, 7, 11, 13, 19, 22, 24, 26, 29, 32, 39, 43, 46, 49, 58, 63, 68, 69, 78, 80, 82, 89, 90, 93, 96, 97, 107, 108, 117, 121, 125, 126, 127, 134, 135, 136, 138, 140, 141, 144, 145, 146, 149, 150, 152, 153, 154, 155, 156, 157, 158, 160, 161, 165, 169, 172, 175, 180, 181, 182, 185, 188, 190, 192, 193, 197, 205, 209, 213, 214, 215, 216, 217, 219, 221, 222, 224, 227, 231, 242, 250, 251, 253, 254, 258, 259, 261, 263.	
Morel <i>Traite des Maladies Mentales</i> (1860) . . . . .	22
New York Constitution . . . . .	69, 70, 72, 119, 120
New York Revised Statutes, 7, 11, 13, 26, 33, 51, 55, 56, 58, 60, 64, 65, 66, 69, 70, 73, 74, 78, 88, 92, 98, 102, 103, 106, 108, 109, 110, 111, 112, 117, 129, 131, 217.	
Petersdorff on Bail . . . . .	18, 172
Phillips on Evidence . . . . .	243
Prichard on Insanity . . . . .	22
Puterbaugh's Pleading and Practice . . . . .	18
Ray's Medical Jurisprudence of Insanity . . . . .	22
Reeve's History . . . . .	195
Roscoe's Criminal Evidence . . . . .	135, 151, 162, 164, 223, 238

	PAGE
Russell on Crimes and Misdemeanors, 8, 9, 10, 29, 32, 67, 68, 69, 70, 71, 91, 103, 185.	
Reports, Term . . . . .	210, 219
Reports, Vermont . . . . .	250
Pickering's . . . . .	196
Allen's . . . . .	132
Greenleaf's . . . . .	251
Croke's . . . . .	
Cushing's . . . . .	176
Salmon's Review State Trials . . . . .	223, 227
Selfridge Trial Report . . . . .	82
Shakespeare . . . . .	191
Solicitor's Journal . . . . .	16
Southern Law Review . . . . .	159
Statutes 24 and 25 Victoria . . . . .	27
Statutes, William IV. (6 and 7) . . . . .	189
Starkie on Evidence . . . . .	236
Starkie on Slander . . . . .	70
Stephen's Digest of Criminal Law . . . . .	16
Terms de la Ley . . . . .	110
Thrupp's Law Tracts . . . . .	5
Tiffany's Criminal Law, 7, 11, 19, 22, 23, 24, 29, 78, 80, 89, 90, 91, 107, 108, 112, 113, 117, 118, 119, 141, 205, 230, 240.	
Townshend on Slander and Libel . . . . .	68
United States Constitution, 12, 45, 119, 186, 189, 190, 195, 261, 262, 267, 268.	
United States Statutes . . . . .	105, 265, 266
Washburn's Judicial History of Massachusetts . . . . .	131
Washburn's Real Property . . . . .	31, 53
Wharton on Criminal Law, 8, 9, 10, 11, 12, 19, 21, 22, 23, 24, 25, 26, 28, 29, 32, 33, 34, 35, 36, 37, 38, 40, 41, 46, 48, 49, 51, 52, 53, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 72, 73, 75, 76, 78, 80, 81, 82, 83, 86, 87, 88, 90, 91, 92, 93, 95, 96, 99, 100, 102, 103, 155, 157, 159, 160, 161, 164, 185, 195, 196, 199, 201, 205, 222, 224, 244, 253, 254, 257, 259.	
Williams on Executors . . . . .	60
Wood on Nuisances . . . . .	85, 86, 87
Wright's Law of Tenures . . . . .	10





# MANUAL OF CRIMINAL LAW.

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## CHAPTER I.

### ELEMENTARY PRINCIPLES OF CRIMINAL LAW.

IN treating of Criminal Law, the distinction is to be kept in mind which prevails between public and private wrongs, which may become the subjects of animadversion by the courts. The purposes of judicial process in respect to the latter, are to obtain recompense or satisfaction for the party who has been thereby injured; while, as to the former, such proceedings have reference to the prevention of such wrongs rather than obtaining, thereby, compensation for the injury done. To bring it within the latter category, the wrong must be one of a public nature in its character, or made such by reason of some statute declaring it to be an offense, for the commission of which the guilty party is to suffer a prescribed penalty, in which the party injured has no other interest than any citizen in the community. Nor are his rights to recover satisfaction for his

personal injuries, thereby occasioned, limited or impaired by this liability of the wrong-doer to a public prosecution.<sup>1</sup> To bring an act thus within the cognizance of the criminal law, it must be a wrong done in which the public as a community are interested, by reason of its being a breach or violation of some public right or duty.<sup>2</sup>

This gives rise to the different forms of procedure by which it is sought to reach the party who has committed a wrong, when it partakes of the character of both a public and private injury. In the one, the body politic, through its representative, the government, is the actor or plaintiff; in the other, the injured party. Nor is the judgment in one process affected by that rendered in the other.

It is competent for the government, if it sees fit, to bend the forms of public process to serve the cause of private redress, where the injury complained of has been caused by persons acting under a power created by the government, as is the case in Massachusetts where death has been caused by the negligence of any servants or agents of a corporation. In such cases a penalty may be recovered of the corporation by indictment for the benefit of the widow and children of the deceased.<sup>3</sup>

No wrong, however, is to be considered a crime so as to come within the cognizance of criminal law,

<sup>1</sup> Boston, &c., *R. R. v. Dana*, 1 Gray, 100; *Hyatt v. Adams*, 16 Mich. 189; *Meister v. The People*, 31 id. 103; Rev. Stat., Ill., 1874, 395, § 293.

<sup>2</sup> 4 Black. Com. 5.

<sup>3</sup> Gen. Stat., c. 63, § 97, 98; Amos, Science of Law, 235.

unless the same, if committed, is in violation of some public law, and this may consist of an act done, if forbidden, or an omission to do it, if required, as the case may be.<sup>1</sup> By law as here spoken of is intended the common or unwritten law, as well as that declared in the form of written statutes.<sup>2</sup>

Before proceeding to analyze the constituent elements of all crimes, and to classify them according to the order in which they are generally treated of, it may be well to recall some of the changes through which the criminal law in this respect has passed, in becoming conformed to the improved condition of civil society. Long within the historic period of the race, many of the wrongs which are now taken cognizance of as crimes against the public law, were held to be within the proper scope of personal satisfaction and redress, and were left to the injured party to seek these on his own behalf. The doctrine of personal revenge for personal injuries prevailed, at a certain stage of civilization, among all the early nations in Europe, as well as Asia. Not only was

<sup>1</sup> 4 Black. Com. 5; 1 Bish. C. L. (4th ed.), § 532; Commonwealth v. Sha tu 'k, 4 Cush. 143.

<sup>2</sup> Commonwealth v. Chapman, 13 Met. 69-71; 2 Br. & Had. Com. (Wait's ed.), 332, n.

It is not easy to reconcile this with the declaration of the Bill of Rights in the Constitution of Massachusetts, Art. 10, "the people of this Commonwealth are not contrrollable by any other laws than those to which their constitutional representative body have given their consent," when it is remembered how often it happens that a principle is laid down, for the first time, as coming within the common law, by a divided court, and is accepted thereafter as such because a major part of its judges had the prerogative of declaring it to be law.

this right of private revenge universally recognized, but it was made a point of honor for the injured party, or, in the case of his death, for his family relations, to exercise it even to the taking of the life of the offender. It was to guard against mistake or too hasty action in carrying out this principle, that altars and cities of refuge were provided, at or within which one who had caused the death of another might be safe from violence, till the circumstances under which this had occurred could be inquired into. By the laws of Moses if he was found to be innocent of guilty intention, he was suffered to escape, but, otherwise, he was delivered up to "the avenger of blood" or the next relations of the man slain, "that he may die."<sup>1</sup>

The first step in the progress of reform from such a barbarous law, was by relieving the relations of one who had been slain, from their *obligation* to take up his quarrel, and revenge his death; and the next by making it honorable to accept a pecuniary satisfaction for personal wrongs, and then compelling him to accept it, if offered, and to forego the rendering of evil for evil, which had once been the only means of redress for injuries done. The early laws of the Saxons, coming down to the time of William, have numerous provisions for the payment of *weregild*,<sup>2</sup> or compensations for such injuries, from the taking of life to the dislocation of a finger. A still more important step was the inflicting fines upon offenders, to be paid to the king, in addition

<sup>1</sup> 19 Deut., 10-13.

<sup>2</sup> 4 Black. Com. 188.

to this compensation to the injured party, whereby the king, for the first time, acquired an interest in the prosecutions for offenses accompanied by breaches of the peace. A Saxon's house was held peculiarly sacred from acts of violence, and the king, acting upon this hint, as the people became more civilized, proceeded to impose a fine for his own use upon any one breaking the peace within the king's house, and next for doing this within a prescribed distance around his house or courts. He then extended this to the king's highway, and, at last, to his whole kingdom, taking upon himself the infliction of whatever penalty was incurred by the breaking of the king's peace, wherever it took place, and leaving the injured party to recover compensation for the damages he may have sustained, by means of a civil action in his own name in the courts of the realm. And in this way, we have the origin of the phrases uniformly used in English indictments, for example, "in the peace of God and our Lord the King," and "against the peace of our Lord the King," and the like, which, with proper modifications, have been adopted into our American forms.<sup>1</sup>

In England, there being no public prosecutor, the party injured by the commission of a crime, is the proper prosecutor therefor, but in the king's name, while in the United States, these prosecutions are, except in their initiation in some cases, the proper business of public officers, who conduct

<sup>1</sup> Kames's L. Tracts, 30, 37, 38, 40; 1 Hale's P. C. 8; Thrupp's Tracts, 121-124.

the same in the name and behalf of the people, whose peace is assumed to have been violated.<sup>1</sup>

The violation of a duty or privilege, if of a public nature, created or imposed by statute, is, in itself, a crime, and a subject of indictment, although the statute may not prescribe any punishment for such violation.<sup>2</sup> In order, therefore, that a given act should constitute a crime, it must be so held by the common law or declared to be such by statute, or be a violation of some duty or privilege created by statute, or it must be something which is expressly prohibited by some statute.<sup>3</sup>

Although the act done may come within the category of crimes as above described, in order that it should be such in fact, it is necessary that it should be accompanied by certain qualities and capacities on the part of the one who does it. They are mentioned here by the way of defining the constituents of crime, but will be treated of more at length hereafter.

In the first place, the act must be done with an intent on the part of the one doing it to commit a wrong. They both must concur; the will must

<sup>1</sup> 1 Bish. C. L. (4th ed.), § 530.

[As to when the public prosecutor may be allowed the assistance of, or be represented by, counsel employed by private parties, see *Commonwealth v. Knapp*, 10 Pick. 477; *Commonwealth v. Williams*, 2 Cush. 582; *Commonwealth v. Gibbs*, 4 Gray, 146; *Commonwealth v. King*, 8 Gray, 501; *Meister v. The People*, 31 Mich. 99; *State v. Bartlett*, 55 Me. 200.]

<sup>2</sup> 1 Bish. C. L. (4th ed.), §§ 187, 535; *Commonwealth v. Silsbee*, 9 Mass. 417; 1 Chitty C. L. 162.

<sup>3</sup> 1 Black. (Sharsw. ed.) 57.

unite with the act.<sup>1</sup> The act may be one of omission to perform a duty resulting from criminal negligence on the part of the one upon whom it devolved.<sup>2</sup> This implies a sufficient capacity on the part of the one doing the act to understand the nature of the act he is doing, and to know that, in doing it, he is violating the law. To this end, he must be of competent age and of sufficient understanding. If of too tender an age, or a too weak or insane state of mind to come within these classes, they are held to want that intent which makes them amenable to the criminal law.<sup>3</sup> And every man is presumed to intend the legal consequences of what he voluntarily does.<sup>4</sup> But if of sufficient age and understanding to act with deliberate intent, it will be no defense that he did not know the criminal character of the act done, since every man is presumed to know the laws of the country in which he dwells, or is doing business. It is otherwise in respect to ignorance or mistake in matters of fact.<sup>5</sup>

In the next place, the act must be a voluntary one. It otherwise wants the requisite intent.<sup>6</sup>

<sup>1</sup> 4 Black. Com. 21; Eden's Pen. Law, 88; Rev. Stat. Ill. 1874, 394, § 280.

<sup>2</sup> Br. & Had. Com. (Wait's ed.) 360. See Rev. Stat. Ill. 1874, 394, § 280.

<sup>3</sup> 1 Bish. Cr. L. § 375, *et seq.*; 1 Br. & Had. Com. (Wait's ed.) 340, 342; Rev. Stat. Ill. 1874, 394, § 282, *et seq.*; Rev. Stat. N. Y., pt. 4. ch. 1, tit. 7, § 2.

<sup>4</sup> *Commonwealth v. Call*, 21 Pick. 522.

<sup>5</sup> 4 Black. Com. 27; 1 Bish. C. L. § 294 *et seq.*; 1 Br. & Had. Com. (Wait's ed.) 348; Moore's Cr. Law, §§ 11, 12; Tiff. Cr. Law, 26.

<sup>6</sup> 4 Black. Com. 27; Amos' Science of Law, 238, 245; Rev. Stat. Ill. 1874, 395, § 289.

In classifying crimes, the first division seems to be into such as are *mala in se* and *mala prohibita*, the first being such as are unlawful in themselves, by being against the law of nature, or the doing of what is intrinsically and morally wrong; the second, such as are made so merely by legislation.<sup>1</sup>

A large proportion, however, of such as are *mala in se* have been declared to be crimes by legislation, and, in that way, have become *mala prohibita*, and the observance of the law as to either is alike binding upon the conscience of the citizen. It was the remark of Rooke, J., that he considered "any distinction between *malum prohibitum* and *malum in se* as pregnant with mischief." "Every moral man is as much bound to obey the civil law of the land, as the law of nature."<sup>2</sup> "Every *malum* is, in truth, a *malum prohibitum* by some law."<sup>3</sup>

But as every *malum* which the law punishes has not been declared to be such by statute, there arises a second division of crimes; those that are such at common law, and such as are declared by statute. Under the former are included acts which openly outrage decency or disturb the peace and public order, or are injurious to public morals, or are a breach of official duty when done corruptly, and are subjects of indictment accordingly.<sup>4</sup>

<sup>1</sup> 1 Black. (Cooley's ed.) 57; *Lewis v. Welch*, 14 N. H. 296; 4 Hawk. P. C. b. 2. c. 37, § 28.

<sup>2</sup> *Aubert v. Maze*, 2 B. & P. 375; *Lewis v. Welch*, *sup*; 1 Black. (Cooley's ed.) 58, *note*.

<sup>3</sup> *Thomas v. Sorrell*, Vaughn, 333.

<sup>4</sup> 1 Whart. C. L. § 3; 1 Russ. on Crimes, 46; *Commonwealth v. Harrington*, 3 Pick. 29.



If a common law crime be made the subject of statutory enactment, it may or may not thereby be superseded, depending upon the statute being, in terms, at variance with the common law, or merely providing a new remedy for the wrong at which it is aimed, making it cumulative instead of its being a substitute. If the statute merely provides a punishment for what had been an offense at common law, it does not change it. But when the whole subject is revised by statute, and the offense qualified which was before an absolute one, and the time for prosecution and the degree of punishment are limited, it would be a constructive repeal of the common law. Where the statute gives a new remedy, either that or the one given by the common law may be pursued at the election of the prosecutor.<sup>1</sup> The importance of this distinction will more fully appear when the forms of indictments come to be considered.

It may be noticed, in passing, that the common law as to crimes is not recognized as applicable in matters of which the Federal Courts have cognizance;<sup>2</sup> and in some of the States no act can be held to be a crime unless it shall have been declared to be such by statute.<sup>3</sup>

<sup>1</sup> *Commonwealth v. Cooley*, 10 Pick. 39; *Jennings v. Commonwealth*, 17 Pick. 82; *Commonwealth v. Rumford Chem. Works*, 16 Gray, 231; 1 Russ. on Crimes, 50; 1 Whart. Cr. L. §§ 10-11.

<sup>2</sup> 1 Whart. Cr. Law, § 163; 1 Bish. Cr. L. §§ 194, 199; *United States v. Hudson*, 7 Cranch, 32; *United States v. Coolidge*, 1 Wheat. 415.

<sup>3</sup> *Key v. Vattier*, 1 Ohio, 132; *Smith v. The State*, 12 Ohio St., 466; *Estes v. Carter*, 10 Iowa, 400; Rev. St. Ind. 1852,

There are applications of the common law by all the States which are of great practical importance, and the first of these consists in supplying any defects in the way of giving effect to a statute, as where the statute prohibits the doing of an act, but affixes no penalty to a breach, the common law comes in and supplements one.<sup>1</sup>

Another use of the common law is in supplying definitions for the technical terms applied in statutes. Even the Constitution has to refer to the common law for the meaning of many of its terms. The terms murder, felony, *habeas corpus*, and the like, are thus construed.<sup>2</sup>

Another classification of crimes is into Felonies and Misdemeanors. This distinction, which has become somewhat, if not wholly, arbitrary, originally had reference to the forfeiture of goods and estates which was involved in the punishment of certain offenses. Felony is said to have been derived from "fee"—"lon," meaning the loss of one's fee or feud.<sup>3</sup> But in Massachusetts all offenses are declared to be felony which are punishable by death or imprisonment in the State's prison, and such,

p. 352; *id.* 1876 (Davis'), p. 606; 1 Bish. C. L. § 35 and notes.

<sup>1</sup> 1 Russ on Cr. 49, 50; 1 Whart. Cr. L. § 10; Bish. Stat. Cr. § 138; 1 Bish. C. L. §§ 237, 238; *Commonwealth v. Chapman*, 13 Met. 69.

<sup>2</sup> *Commonwealth v. Chapman*, *sup.*; 1 Bish. C. L. § 35, note; *Merchants Bank v. Cook*, 4 Cush. 411.

<sup>3</sup> 4 Black. Com. 95, 97; Jacob L. Dic., Felony; 1 Bish. C. L. § 615; 1 Whart. Cr. L. § 2; Wright, Ten. 45, n; Barring. Stat. 276.

substantially, is the case in [Illinois, Iowa, Michigan,] New York, and Virginia.<sup>1</sup>

These terms, Felonies and Misdemeanors, were not in themselves indicative, at common law, of the relative grades of crime in respect to their magnitude or the depravity of the act, the stealing of a shilling, for example, being a felony, while perjury was classed among misdemeanors. But the distinction is still important to be observed in many respects. Thus it is essential to the conviction of one charged with a felony that the indictment should allege the act to have been done "feloniously." If a man is charged in an indictment with "stealing" a horse, he would only be convicted of a trespass unless it were charged to have been "feloniously" done.<sup>2</sup> If the act charged be in itself a misdemeanor only, the alleging it to have been done feloniously is surplusage, and of no effect.<sup>3</sup>

<sup>1</sup> Gen. St. c. 168, § 1; Rev. Stat. Ill. 1874, 394, § 277; Rev. Stat. N. Y. pt. 4, ch. 2, tit. 7, § 30; 2 Comp. Laws, Mich., 1871, § 7820; Rev. Laws Iowa, 1860, § 4429; Code of Iowa, 1873, p. 642, § 4104; 1 Whart. C. L., § 2; Tiff. Cr. L. 724.

<sup>2</sup> 1 Chitty C. L. 242; Arch C. P. 46; 1 Whart. Cr. L. § 399 *et seq*; Moore's Cr. L. p. 550, § 790; p. 225, note 6; p. 272, notes 2, 4; p. 296, note 8; p. 312, note 3; p. 320, note 3; p. 321, note 4; p. 332, note 2; p. 340, note 2; p. 411, note 2; p. 447, note 1; p. 339, note 6; p. 412, note 4.

By Statute in Massachusetts the omission of the word "feloniously" in an indictment, if the act done be a felony, is of no effect. Gen. St. c. 168, § 2.

[By statute in Michigan the term "feloniously," when used in any statute, is to be construed as synonymous with "criminally." Comp. Laws, 1871, § 7821.]

<sup>3</sup> Commonwealth *v.* Squire, 1 Met., 260; 1 Whart. Cr. L. § 400; Moore's Cr. L. p. 550, § 790.

This distinction between felonies and misdemeanors is recognized by the Constitution as well as Statutes of Massachusetts. So it is in the Constitution of the United States.<sup>1</sup>

In applying it, practically, it is only of felonies that accessories are predicated, by which are meant, such as aid in the commission of the offense charged, either before or after the act is done. In misdemeanors, all who engage in the commission of the act, or in procuring it to be done, are held to be principals, and may be prosecuted accordingly.<sup>2</sup> But, in treason there are no accessories, at least in respect to causing or procuring it to be committed, though, if the accessory be after the act done, it seems he would be treated and tried as such, and not as principal.<sup>3</sup>

Another distinction between felonies and misdemeanors consists in the right which one who has suffered by the misdemeanor of another, has, in some cases, to settle with the offender, and receive compensation for the injury he has sustained, where-

<sup>1</sup> Mass. Bill of Rights, Art. 25; Gen. Stat. c. 168, § 1; U. S. Const., Art. 4, § 2. See, also, the authorities on the subject cited in the preceding notes.

<sup>2</sup> 1 Chitty, C. L. 261; 1 Whart. Cr. L. § 131; Commonwealth *v.* Barlow, 4 Mass. 440; 1 Bish. C. L. § 685. [The Statute of Illinois (Rev. Stat. 1874, 393, § 274) makes all accessories at or before the fact, principals. See *Baxter v. The People*, 3 Gilm., 368; *Brennan v. The People*, 15 Ill., 511; *Kennedy v. The People*, 49 id. 488; *Coates v. The People*, 72 id. 304. So, in Michigan, 2 Comp. Laws, 1871, § 7934. See *Shannon v. People*, 5 Mich. 71.]

<sup>3</sup> 4 Black. Com. 35; 1 Whart. Cr. L. § 131; 1 Bish. C. L. §§ 681, 682.

as no one has a right to compound whatever is a felony, by accepting a compensation under an agreement not to prosecute the offender therefor, and if he does, he is himself guilty of a crime by such composition.<sup>1</sup> But the right of composition does not extend to all misdemeanors. The rule as given by statute in Massachusetts, extends to "assaults and batteries or other misdemeanors, for which the party injured may have a remedy by civil action," with a few prescribed exceptions.<sup>2</sup>

A distinction was made at common law between such felonies as were with and such as were without "benefit of clergy," which is another form of distinguishing between such as were punishable capitally and such as were not. The number of capital offenses at different periods was frightfully large. The number as given by Blackstone as being capital without the benefit of clergy, was one hundred and sixty, made so by act of Parliament.<sup>3</sup>

There were classes of offenses, however, in the early history of the criminal jurisprudence of England, the cognizance and trial of which, if charged upon a priest, the church claimed to the exclusion of the judicial court of the realm. This was conceded by the latter, so that a "plea of clergy" was

<sup>1</sup> Commonwealth. *v.* Pease, 16 Mass. 92; 1 Bish. C. L. § 713; 4 Black. 133; 1 Chitty, C. L. 4.

[The compounding of any criminal offense is prohibited by statute in Illinois, Rev. Stat. 1874, 358, § 43; Moore's Cr. L. § 243, *et seq.* See, also, Rev. Stat. N. Y. pt. 4, ch. 1, tit. 6, § 12.]

<sup>2</sup> 1 Bish. C. L. § 713, and note; Gen. Stat. c. 171, § 28.

<sup>3</sup> 4 Black. 18.

an effectual bar to proceedings under an ordinary indictment. As the clergy, at that time, were possessed of what little learning there was, it was taken to be sufficient evidence that a prisoner charged with an offense was in orders, if he could read. This in time became a practical farce, and to prevent a repetition of it in individual cases, the defendant who claimed the benefit of clergy was burned in the hand to identify him as having once taken it, if he should be again charged with a similar crime. Even this became in time a matter of form, but punishments less than capital were applied when there were convictions for what had been clergyable offenses, so that felonies with or without benefit of clergy became a distinction between such as were or were not capital offenses.<sup>1</sup>

This plea of "benefit of clergy" has, at times, been recognized in the United States as a part of the common law, though now generally abolished both in England and in this country by statute. Cases to that effect are cited from North and South Carolina, Pennsylvania, Minnesota and Indiana.<sup>2</sup> The privilege was effectually claimed in Massachusetts upon the trial of the British soldiers in Boston in 1770, where, upon a charge of murder, the jury rendered a verdict of manslaughter, whereupon the prisoners "prayed the benefit of clergy, which was

<sup>1</sup> 4 Black, 365-374.

<sup>2</sup> 2 Br. & Had. Com. (Wait's ed.) 630, n. [See 1 Bish. Cr. L. § 938, for the American cases on this subject. The benefit of clergy, appeals of felony and trials by battle are abolished by statute in Illinois. Rev. Stat. 1874, 410, § 429.]

allowed them, and they were each of them burnt in the hand in open court, and discharged.”<sup>1</sup> This benefit of clergy was abolished in England in 1827, by Sir Robert Peel’s act, and in 1837 two hundred crimes ceased by statute to be felonies without benefit of clergy, whereby only some five or six capital offenses were retained.<sup>2</sup> The change in this respect in England cannot be better measured than by the fact that during the reign of Henry VIII. the number of public executions was 72,000. The change in Massachusetts is shown by the fact that while in 1650 there were seventeen capital offenses, including the returning into the colony by a Quaker who had been banished, murder in the first degree is the only capital offense which remains on her statute book.

In view of the conviction upon the minds of many living under the common law, which has been growing since the days of Bentham, of the need of prescribing for a community what acts shall be punishable as crimes, the subject of a criminal code deserves a single word, if for no other reason than to state, briefly, what has already been done in that direction. France adopted such a code in 1810, containing four hundred and eighty-four articles, in speaking of which Mr. Sanford in his report upon the general codes of Europe says, “a single manual for a justice of the peace (Burns, in England,) contains one hundred times the num-

<sup>1</sup> Trial of the British soldiers, etc., 143.

<sup>2</sup> 1 Law Rev. (Lond.) 448.

ber of pages employed to express all the laws of the penal code of France.<sup>1</sup>

This code has been adopted in Italy, Sicily, Holland, Belgium, The Rhine Provinces, Poland and Switzerland. And Bavaria, Austria and Prussia have also adopted criminal codes. Mr. Livingston prepared his penal code for Louisiana in 1820, but it has never been adopted as a law.<sup>2</sup>

Such codes have been framed and reported by commissioners appointed for the purpose in Massachusetts and New York, but no further action has been taken in the matter, nor is there any proper code of criminal law in force in any part of the United States.<sup>3</sup>

In speaking of the progress which has been made in the improvement of the criminal law in England, it may be proper to mention, although it may be necessary to refer to the subject again, the substitution of English for the Latin as the language of indictments, in 1733; the right to persons charged with felonies to have their witnesses called and testify under oath, which was established in 1702, and the right of persons charged with felonies to be heard by counsel, which was partially conceded in 1693, but not fully till 1837.

<sup>1</sup> p. 124.

<sup>2</sup> Edinburgh Rev. No. 258, p. 184.

[<sup>3</sup> See the observations of Sir James Fitzjames Stephens on the subject of penal codes, in the introduction to his *Digest of the Criminal Law of England*, which work the author states was undertaken to exemplify the possibility and convenience of codifying the criminal law. See, also, an article upon the subject, "Codes, Digests and Treatises," in 21 *Solicitors' Journal*, (Oct. 13, 1877), p. 911.]



Many of what were improvements in the English criminal law, were a part of the American law from the first, either by adopting the provisions of the English statutes as a part of the common law here, or by giving them the form of statutes by the colonial legislatures. Such English statutes as were applicable to the wants and condition of the early settlers of these colonies, were adopted as a part of their common law.<sup>1</sup> Such was the case in the matter of making use of the English language in law proceedings, the admission of witnesses to testify under oath, and the privilege of employing counsel.<sup>2</sup>

Another classification of crimes may be incidentally mentioned here, which is such as are bailable and such as are not. It is sufficient, for the present, to say that the term "bail," applies to cases where one is arrested upon a criminal process, and, not wishing to be committed to prison, procures some one or more persons to become responsible to the government in a sum of money to be paid if the person arrested shall fail to surrender himself in

<sup>1</sup> *Commonwealth v. Warren*, 6 Mass. 72; *Commonwealth v. Leach*, 1 Mass. 60; *Harding's Case*, 1 Maine, 25.

[As to what English statutes (being prior to the fourth year of James the First) are of force in Illinois, see *Rev. Stat. 1874*, 269, § 1.

In Michigan it was enacted, in the year 1810, that no English statute should be of any force within the territory. 1 *Ter. Laws* (ed. of 1871) pp. 210, 900. See, generally, *Cooley's Const. Lim.* \*23, 24 and notes.]

<sup>2</sup> These were deemed of sufficient importance to find a place in the Bill of Rights in the Constitution of Massachusetts. Art. 12.

court for trial at the time fixed for the same. The right to be thus relieved from imprisonment when arrested, is incident to all crimes except such as are punishable capitally. And it is a provision of the English statute, as well as of the State and Federal Constitutions, that "excessive bail" in such cases shall not be required.<sup>1</sup> If bail in such cases is refused, or excessive bail is required, the party thereby suffering has a remedy under the process of *habeas corpus*.<sup>2</sup>

<sup>1</sup> 1 Br. & Had. Com, \*160; 4 id. \*393 and note; Cooley's Const. Lim. \*310.

<sup>2</sup> Petersdorf, Bail, 518; Puterbaugh's Pl. & Pr., 716.

## CHAPTER II.

## OF CRIMES AND THEIR CLASSIFICATION.

BEFORE attempting to enumerate the crimes of which the courts take cognizance, it seems proper to consider what persons are, by law, deemed capable of committing crimes, and such as are exempt from responsibility for acts done, which would otherwise constitute crimes.

If an infant be under the age of seven years, he is held to be incapable of committing a crime punishable by law. If he is of the age of fourteen, which, in law, is held to the age of discretion, he is presumed to be of capacity to commit any crime. Between the ages of seven and fourteen, whether an infant is to be held of sufficient capacity to respond for crime, depends upon the evidence in each particular case, it being for the jury to find whether the person charged had, at the time of committing the act, a guilty knowledge that he was doing wrong. The burden of proof to show this is on the government. The legal presumption is against his capacity.<sup>1</sup>

Another ground upon which persons are held to be incapable of committing criminal acts, is the

<sup>1</sup> 1 Whart. C. L. §§ 58, 59; 1 Bish. C. L. § 368; 4 Br. & Had. 17, 18, n; Tiff. C. L. 4; Moore's Cr. L. § 4. [In Illinois an infant under the age of ten years cannot be found guilty of any crime or misdemeanor. Rev. Stat. 1874, 394, § 283.]

want of ability to distinguish between right and wrong, by reason of idiocy or insanity.

From the want of any standard by which to apply this test, as in the case of an infant, few subjects have been so prolific of difficulty in the administration of the criminal law, as that of insanity. Every one who has arrived at years of discretion is presumed to be of sound mind, until the contrary is proved,<sup>1</sup> and if he sets up a plea of insanity the burden of establishing it is upon him.<sup>2</sup> The language of the Court in one case is: "It must be so great as entirely to destroy his perception of right and wrong, and it is not until that perception is thus destroyed that he ceases to be responsible."<sup>3</sup>

[<sup>1</sup> See Ewell's Lead. Cases, 716, 718, 719, and cases cited; McNaghten's case, 10 Cl. & Fin. 200.]

[<sup>2</sup> See the cases in support of this proposition collected in Ewell's Lead. Cases, 719.]

Another class of cases lays down what, in view of the presumption of the innocence of the accused, seems to be the more reasonable rule—that sanity being the normal condition of the mind, "they [the prosecution] are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defense. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh, and pass upon it with the understanding that, although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt." *People v. Garbutt*, 17 Mich. 23; *Hopps v. The People*, 31 Ill. 385; *Chase v. The People*, 40 id. 352. See the cases collected in Ewell's Lead. Cases, 719.]

<sup>3</sup> *Flanagan v. People*, 52 N. Y. 467; *Ortwin v. Commonwealth*, 76 Penn. St. 414; *Commonwealth v. Heath*, 11 Gray, 304; *Commonwealth v. Eddy*, 7 Gray, 584. See, also, *McNaghten's case*, *supra*; *Hopps v. People*, 31 Ill. 385.

The capacity to distinguish between right and wrong here spoken of, has reference to the particular act complained of, since it is a familiar fact that men may be partially insane, or insane upon some subjects and sane in respect to others.<sup>1</sup>

Questions have arisen, in respect to which the authorities seem to be somewhat conflicting, upon which party is the burden of proof, if, upon the evidence offered of the prisoner's insanity, there is a reasonable doubt of his sanity in the mind of the jury. The weight of authority seems to be in favor of holding the government to the proof in such cases that he was sane, since criminal intent is one of the essential elements of crime to be established by the government.<sup>2</sup>

The defense of moral insanity has often been raised in the courts, and, although strongly advocated by writers upon medical jurisprudence, it has not generally found much favor in the minds of courts or juries, where the evidence shows a mere morbid, wicked, or depraved propensity of the will, while the general powers of the mind remain in their normal activity.<sup>3</sup>

<sup>1</sup> 1 Whart. C. L. §§ 15, 16; *Commonwealth v. Rogers*, 7 Met. 502-504; *McNaghten's case*, 10 Cl. & Fin. 200. See, also, *Ewell's Lead. Cases*, 660, *et seq.*

<sup>2</sup> *Commonwealth v. Kimball*, 24 Pick. 373, 374; 1 Whart. C. L. §§ 711, 55; 2 Br. & Had. Com. (Wait's ed.) 342-3, and the American cases cited in the note, covering several of the points above stated. See note 2, p. 20.

<sup>3</sup> 2 Br. & Had. Com. (Wait's ed.) 343, note; *Flanagan v. People*, 52 N. Y. 467.

[See *Carpenter's Mental Physiology*, § 555, *et seq.*; *Krafft Ebing, Gerichtlicher Psychopathologie*, p. 155, *et seq.*; *Ray's*

It matters not in its bearing upon the responsibility of one committing a criminal act, if insane, how he becomes so, even though it be in consequence of habitual intoxication, provided it be not a case of voluntary intoxication as distinguished from settled insanity, or intoxication procured by the fraud or stratagem of another.<sup>1</sup> But if a state of temporary insanity follows as the immediate result of drinking to intoxication, the man voluntarily drinking is criminally amenable for what he does under the influence of the drink taken.<sup>2</sup>

Married women are of capacity to commit crimes, but if they do so in the presence of their husbands, they are presumed to have acted under their coercion, and are thereby excused.<sup>3</sup> There are some misdemeanors for the commission of which a married woman would not be excused, although done in her husband's presence, such as keeping a brothel, and uttering counterfeit coin.<sup>4</sup>

Med. Jur. of Insanity, 209, 292; *Morel Traite des Maladies Mentales*, 1860, p. 542; Prichard on Insanity, (ed. 1833,) p. 14; Maudsley, Physiology and Pathology of the Mind. (ed. 1867,) p. 311; Bannister on Moral Insanity, Chicago Journ., Nerv. and Ment. Disease, Oct., 1877, for a medical view of the question.]

<sup>1</sup> 2 Br. & Had. Com. (Wait's ed.) 346, note; 1 Whart. C. L. § 32; Moore Cr. L. § 7; Tiff. Cr. L. 18, 19.

<sup>2</sup> 1 Bish. C. L. § 400; Moore Cr. L. § 7; Tiff. Cr. L. 18; Rev. Stat. Ill. 1874, 395, § 291.

<sup>3</sup> 4 Black. 22, 28; 1 Bish. C. L. § 357, *et seq.*, who does not except, as many writers do, treason and murder, from the offenses for committing which they would be excused; 1 Whart. Cr. L. § 71, *et seq.*, who also takes the same view; 1 Hale P. C. 47. [See Rev. Stat. Ill. 1874, 395, § 288, modifying the common law rule.]

<sup>4</sup> 4 Black. 29; 1 Hawk. P. C. 2, 3; 8 Car. & P. 19.

The capacity of corporations to commit criminal acts is an artificial one only, and created by statute requiring them to perform certain prescribed duties. For a breach of these they are liable to be indicted and fined. But they cannot be indicted for the commission of an act, the criminality of which depends upon a *scienter* and intent, nor can they for crimes implying personal violence, like riots, assaults and the like, nor from breaches of morality implying a corrupt mind.<sup>1</sup> But where a crime or misdemeanor has been committed under color of corporate authority, or when a corporation clearly transcends its authority, and does acts amounting to trespass on other's lands, the individuals who cause the act to be done, and not the corporation, are responsible for what is done.<sup>2</sup>

In England and many of the States the law, in defining crimes, distinguishes between the degrees of criminality attached to their commission, and the punishment to be inflicted therefor.<sup>3</sup>

<sup>1</sup> 1 Whart. Cr. L. § 85 *et seq.*; 1 Bish. Cr. L. § 417, *et seq.*; Commonwealth *v.* Newburyport Bridge, 8 Pick. 42; Ang. & Ames, Corp. § 394-6; Reg. *v.* Railway, &c., 9 Ad. & El. N. S. 314; Reg. *v.* Railway, &c., 3 Ad. & El. N. S. 223; Benson *v.* Monson & Brimfield Mg. Co. 9 Met. 562; Mass. Gen. Stat, c. 63, §§ 97, 93.

[An action of trespass for an assault and battery will, however, lie against a corporation. St. Louis, A. & C. R. R. Co. *v.* Dalby, 19 Ill. 353; Chicago & N. W. Rwy. Co. *v.* Peacock, 48 id. 253.]

<sup>2</sup> State *v.* Great Milk Co. 20 Maine, 41; Ang. & Ames, Corp. § 394.

<sup>3</sup> In Massachusetts this only applies to murder. Gen. St. c. 160, §§ 1, 2; 1 Whart. C. L. §§ 112, 116. See also Tiff. Cr. L.

The element of *malice* enters into most of acts which are punishable as crimes, but it does not necessarily imply what is understood to be meant by the term in the popular sense, hatred and ill will, but only the willful doing of an unlawful act.<sup>1</sup>

As the present work is designed to embody, for ready reference by the student, the elementary principles only of the criminal law, as they are applied in practice, it has not been thought necessary to do more in describing or defining what the law takes cognizance of as crimes, than to borrow such outlines as are found in most of the accredited treatises upon criminal law. Nor will it be necessary to attempt to enumerate all these, since the purposes at which it aims are rather to give an idea of the forms of process and modes of prosecution by which crimes are made cognizable by the courts, than to point out the distinctive characteristics of the different classes into which they are divided. For convenience they will be mentioned mainly in their alphabetical order, rather than their relative magnitude or importance, or what would be a more systematic arrangement, into crimes against the sovereignty of the State, against the person, against property, against the course of public justice, and the like. In enumerating statute offenses, such as are

810, 811. Mr. Wharton has collected the statutes of the several States upon this point. 2 Whart. C. L. §§ 1075, 1082.

<sup>1</sup> Commonwealth v. Bonner, 9 Met. 410; 1 Bish. C. L. § 429; Tiff. Cr. L. 814. [See Rev. Stat. Ill. 1874, 374, § 140, for a definition of malice in cases of murder. See Moore Cr. L. §§ 321, 333, *et seq.*]



declared to be such by the statutes of Massachusetts are mentioned by way of example, since there is not space for all the States.

AFFRAY consists in two or more persons fighting together in a public place, to the terror of the people. If the fighting be of a nature calculated to excite terror in the minds of reasonable men, it is sufficient, although no actual terror is proved. If more than two persons are thus engaged, it may bring the act within the category of riots, which will be spoken of hereafter.<sup>1</sup>

There is also a class of offenses which are regarded as such, for the same reason that affrays are indictable, such as going around with dangerous weapons without reasonable cause of apprehension of an assault or other injury, engaging in a duel, and the like.<sup>2</sup>

ARSON is defined to be "the malicious and willful burning the house or out-house of another man." It was a felony at common law and formerly was punishable capitally.<sup>3</sup> By these authorities it is held that by "*house*" is meant not only a dwelling house of another, but all out-houses that are parcel thereof, though not contiguous thereto, nor under

<sup>1</sup> 4 Black. 145; 1 Whart. Cr. L. § 2494; 2 Bish. C. L. § 1, *et seq.*; Hawk. P. C. c. 63, §1; Rev. Stat. Ill. 1874, 390, § 250; Mass. Gen. Stat. c. 169, § 14.

<sup>2</sup> Gen. Stat. Mass. c. 169 § 15; Whart Cr. L. § 2496; 1 Bish. Cr. L. § 540; 2 Bish. C. L. § 312, *et seq.*

<sup>3</sup> 4 Black. 219; East. P. C. 1015; 2 Whart. C. L. § 1658; 2 Bish. Cr. L. § 8.

the same use, as barns and stables. So, it would be arson of another's house if one willfully sets fire to his own house whereby that of the other is burned.<sup>1</sup> There must be an actual burning of the building or some part of it, but it is not necessary that it or any part of it should be wholly consumed.<sup>2</sup>

It is not an offense to burn one's own dwelling house, unless it be in the occupation of another under a lease, in which case it would be, or unless it be done to defraud an insurance office,<sup>3</sup> or it was so contiguous to the house of another as to burn it, but the burning of a house by the tenant who holds a lease of it, is not arson by the common law.<sup>4</sup>

The burning of one's own house or that of an-

<sup>1</sup> 4 Black. 321; 2 Whart. Cr. L. § 1667; East. P. C. 492, 1020, 1031. Mass. Gen. St. c. 161, § 1, speaks of burning the dwelling house or any building *adjoining* such dwelling house, changing the common law in this respect. [See also Rev. Stat. Ill. 1874, 354, § 13; 2 Comp. Laws Mich. 1871, § 7552-7554; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 1, § 9; Code of Iowa, 1873, p. 603, §§ 3880, 3881, for statutory modifications of the crime of arson.] In Massachusetts the burning must be of a dwelling house, and to bring it within the meaning of that term, it must be a place of the residence of the party named, and must be inhabited and occupied at the time, and some one must then live in it. *Commonwealth v. Baring*, 10 Cush. 478.

<sup>2</sup> East. P. C. 1020; Moore Cr. L. § 449; 2 Whart. Cr. L. § 1659; *Mead v. City of Boston*, 3 Cush. 407.

[<sup>3</sup> Mass. Gen. Stat. c. 161, § 7; Rev. Stat. Ill. 1874, 354, § 14; 2 Comp. Laws Mich. 1871, § 7560; Code Iowa, 1873, p. 604, § 3888; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 3, § 5.

At common law arson cannot be committed by a man upon his own house even if insured. 2 Bish. C. L. § 12.]

<sup>4</sup> 2 Whart. C. L. § 1664; *Bloss v. Tobey*, 2 Pick. 320; East. P. C. 1031; 2 Bish. C. L. § 13; East. C. L. 1026.

other, with intent to injure the insurer thereof, is made a felony by statute in Massachusetts, [as well as in some other States.]<sup>1</sup>

ASSAULT AND BATTERY. These are mentioned together because, although there may be an assault which is not accompanied by a battery, every battery implies an assault as an essential element of the crime. The one is an attempt or offer to beat another, without touching him, the other is an unlawful beating of another, and the least touching of another's person willfully or in anger is a battery.<sup>2</sup>

An attempt to commit a battery which would constitute an assault, must be a possible one, if not prevented by some cause other than the incapacity attending the act itself. Thus to point a loaded gun at a man who is within its range, or striking at him while within his reach, would be an assault; but it would not be such if the distance was too great to reach his person. To constitute an assault, there must be the commencement of an act which,

<sup>1</sup> Gen. St. c. 161, § 7.

See also East. P. C. 1028, 1031, and note 3, *ante*, p. 26.

By the statute of Massachusetts, it is made a felony to maliciously burn a church, court house, college, store, or any other building, of a class enumerated in the statute, and the burning of barns, stacks of hay, boards, timbers and the like, is punished by imprisonment or fine, [and the same rule has been prescribed by statute in other States.]

Gen. St. c. 161, §§ 4, 5. See also Stat. 24 and 25, Vict. c. 97; 2 Br. & Had. Com. (Wait's ed.) 504; Rev. Stat. Ill. 1874, 351, § 13; 2 Comp. Laws Mich. 1871, § 7554; Code of Iowa, 1873, p. 604, § 3882.

<sup>2</sup> Hawk. P. C. c. 62, §§ 1, 2; 3 Black. 120; 2 Br. & Had. Com. (Wait's ed.) 109, note; *ib.* 492, 493, note.

if not prevented, would produce a battery.<sup>1</sup> If, in attempting to strike another, he comes so near as to create reasonable apprehension of immediate violence, it would be an assault although he failed to reach him.<sup>2</sup>

The force in the cases supposed, must be unlawfully exercised to constitute the offense, for if done in defense of one's person or property, or by unavoidable accident, or in giving moderate correction by a parent, master or school teacher, to his child, apprentice or pupil, it does not constitute an offense.<sup>3</sup> A fighting with fists is an assault and battery, though the parties agree thus to fight and have no ill will towards each other.

There is a class of assaults which are aggravated by the intent with which they are committed, and are punished accordingly, such as assaults with an intent to commit murder, rape, and the like, which are more properly treated of in connexion with the offenses with which they are associated. If it be committed with an intent to commit a felony, it cannot be compounded by the parties, as may be done in ordinary cases of assault and battery.<sup>4</sup>

BARRATRY is an offense at common law, and is so nearly allied to *Champerty* and *Maintenance* that

<sup>1</sup> 2 Br. and Had. Com. (Wait's ed.) 493 and note; 2 Whart. Cr. L. § 1244; Rev. Stat. Ill. 1874, 355, § 20.

<sup>2</sup> 2 Bish. C. L. §§ 31, 32.

<sup>3</sup> 3 Black. 120; *Commonwealth v. Randal*, 4 Gray 38; 2 Whart. C. L. § 1259; 2 Bish. C. L. § 37; *Morrow v. Wood*, 22 Am. L. Reg. 694; *Commonwealth v. Collberg*, 119 Mass. 350.

<sup>4</sup> Mass. Gen. Stat. c. 171 § 28. See *ante*, p. 13, note 1.

they are treated of under the same head. They all relate to unlawfully stirring up and encouraging law suits, and lie within so narrow a compass as to require little more than the definitions as found in accredited works upon criminal law, to convey an idea of what the law is in respect to what constitutes their criminality. A *barrator* is defined to be a *common* mover, exciter or maintainer of suits or quarrels in courts, in which he is not interested in his own right, and the number of those suits must be, at least, three, to render him amenable as a common barrator.<sup>1</sup> But this does not extend to attorneys for engaging in the management of suits for others.<sup>2</sup>

CHAMPERTY is defined to be the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it.<sup>3</sup> It takes its name from *campum partire*, to divide the land.<sup>4</sup> It was forbidden by 3 Ed. 1 c. 25, but was also illegal at common law.<sup>5</sup>

<sup>1</sup> 1 Russ. Cr. (Greave's ed.) 266; Commonwealth v. McCulloch, 15 Mass. 229; Commonwealth v. Davis, 11 Mass. 434, 435; Hawk. P. C. c. 81, §§ 1, 3; 2 Bish. C. L. § 64; 2 Whart. C. L. § 2391; Tiff. Cr. L. 596; Moore Cr. L. §§ 233, 242; Rev. Stat. Ill. 1874, 355, § 26.

<sup>2</sup> Hawk. P. C. c. 81, § 4.

<sup>3</sup> Hawk. P. C. c. 84, § 1; 2 Bish. Cr. L. § 131; Thompson v. Reynolds, 73 Ill. 11; Lathrop v. Amherst Bank, 9 Met. 490.

<sup>4</sup> 1 Russ. Cr. (Greave's ed.) 259; Thompson v. Reynolds, 73 Ill. 11; 2 Whart. C. L. § 2804.

<sup>5</sup> Lathrop v. Amherst Bank, *sup.*

[It is a misdemeanor at common law, and punishable in Illinois as such. Thompson v. Reynolds, 73 Ill. 11, explain-

It is not essential to the commission of the offense that one who maintains the suit should do it at his own expense, and, on the other hand, it would not be *champerty* if the party have a remote or contingent interest in the subject litigated, or stand in near affinity to the one in whose behalf the suit is prosecuted.<sup>1</sup>

Although it would be *champerty* in an attorney to purchase the subject matter of a suit *pendente lite*, it would not be to accept an assignment of it by the way of security.<sup>2</sup>

In a case in Massachusetts an attorney was employed to collect a large debt for a client in the State of New York, for which he was to receive ten per cent. of what he collected. The attorney rendered valuable and important services in prosecuting the suit, and claimed to recover therefor either the percentage or compensation for his services. But the court held the contract as to the percentage void for *champerty*, but that he might claim a reasonable compensation for services rendered.<sup>3</sup> A contract to share in a matter in dispute in court for furnishing evidence in the case, was held to be void for *champerty*.<sup>4</sup>

ing *Newkirk v. Cone*, 18 Ill. 449. In Iowa, Ohio and Vermont it is not, as it seems, a criminal offense. *Key v. Vattier*, 1 Ohio 58; *Hall v. Ashby*, 9 id. 96; *Weakly v. Hall*, 13 id. 167; *Wright v. Meek*, 3 G. Greene, 472; *Danforth v. Streeter*, 28 Vt. 490. See, also, 2 Comp. Laws, Mich. 1871, § 7427.]

<sup>1</sup> *Lathrop v. Amherst Bank*, *sup.*

<sup>2</sup> *Anderson v. Radcliff*, E. B. & E. 816; *Simpson v. Lanib*, 7 E. & B. 84; *Wood v. Downes*, 18 Ves. 120.

<sup>3</sup> *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, *sup.*

<sup>4</sup> *Stanley v. Jones*, 7 Bing. 369.

Under this head is included the buying and selling pretended titles to lands, which was early forbidden by statute. Among these was the 32 Hen. 8, c. 9, which forbids it, "unless the seller, his ancestors, or they by whom he claims, have been in possession of the same or of the reversion or remainder thereof." And in this lies the origin of the law which prevails in every State, where it has not been changed by statute, that a deed of land of which the grantor is then disseized, is void.<sup>1</sup> The deed in such cases being void, a right of action remains in the grantor to recover the seizin, and the grantee may bring it in the name of the grantor for his own benefit.<sup>2</sup>

And this doctrine extends to all cases of assignment of unnegotiable *choses in action*. With the exception of bills of exchange, which were negotiable by the custom of merchants, none others were negotiable, until promissory notes, if of the requisite form, were made so by the statute of Anne. But the assignee might sue the promissor in the name of the principal to the use of the assignee.<sup>3</sup>

MAINTENANCE is an "officious intermeddling in a suit that no way belongs to one, by maintaining or

<sup>1</sup> 3 Wash. Real. Prop. (4th ed.) 329; 2 Bish. Cr. L. § 136, *et seq.* *Contra*, in Ohio, Illinois, Michigan and Iowa; *Hall v. Ashby*, 9 Ohio, 96; *Willis v. Watson*, 4 Scam. 54; *Fetrow v. Merriwether*, 53 Ill. 275; 2 Comp. Laws, Mich. 1871, § 4209; Code of Iowa, 1873, p. 357, § 1932.

<sup>2</sup> *McMahan v. Bowe*, 114 Mass. 144; 3 Wash. Real Prop. (4th ed.) 329; *Williams v. Protheroe*, 5 Bing. 309.

<sup>3</sup> 2 Bish. C. L. § 134; *Lewis v. Bell*, 17 How. 616; *Lathrop v. Amherst Bank*, *sup.*

assisting either party with money or otherwise, to prosecute or defend it.”<sup>1</sup>

The law of maintenance is much less stringent than formerly, and if one has an interest in a suit, present or contingent, like that of a reversioner or heir apparent, he may aid in carrying it on or defending it. So may he assist a near kinsman, servant or poor neighbor in a suit, though, it is said, he may not furnish money for the purpose to any more remote kin than a father or son. Nor is it unlawful to give or lend money to one to aid him in accomplishing a lawful end by lawful means.<sup>2</sup> But where one stirred up a pauper to commence and prosecute a suit without a reasonable and probable cause, it was held to be an offense at common law, and he was responsible to the party sued.<sup>3</sup>

The foregoing cases and authorities so far as they relate to what counsellors and attorneys at law may lawfully do, in commencing and carrying on suits for others, seem to sustain these propositions, viz: They may not stir up or encourage suits which are known to be without reasonable cause, nor agree to share with a suitor in what he can recover in a suit. And if the suitor agrees to pay him a certain percentage of what is gained in a suit, the contract is void, though he might recover a reasonable com-

<sup>1</sup> 4 Black. 134; Hawk. P. C.. c. 83, § 1; 1 Russ. Cr. (Greave's ed.) 254; Rev. Stat. Ill. 355, § 27; Moore, Cr. L § 238.

<sup>2</sup> 4 Black. 134; 1 Russ. Cr. (Greave's ed.) 255, 256, 257; 2 Bish. C. L. 122, *et seq.*; Lathrop v. Amherst Bank. *sup.* See, also, 2 Whart. Cr. L. § 2804.

<sup>3</sup> 1 Russ. Cr. (Greave's ed.) 255, note; Pichell v. Watson, 8 M. & W. 691.



pensation for his services. It is not only his right but his duty to use all reasonable and lawful means in prosecuting the claim of his client. But in England, unlike the law in this country, a barrister cannot sue for or recover for services rendered in the prosecution of a suit for a client, however meritorious.<sup>1</sup>

BRIBERY, like champerty and maintenance, is an offense against public justice, and consists in a judge or any other person concerned in the administration of justice, taking an undue reward to influence his conduct in his office.<sup>2</sup> Another definition is the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done.<sup>3</sup> And it seems to be equally a crime to give and receive, and the attempt by offering a bribe is a complete offense, whether received or not.<sup>4</sup>

BURGLARY is defined by Coke as the breaking and entering a mansion house by night, with intent to commit a felony.<sup>5</sup>

<sup>1</sup> *Kennedy v. Brown*, 13 C. B. N. S. 677; *Alden v. Patterson*, 5 John. Ch. 48.

<sup>2</sup> 4 Black. 139; Hawk. P. C. c. 67, § 2.

<sup>3</sup> 2 Bish. C. L. § 85.

<sup>4</sup> 4 Black. (Shars. or Cooley's ed.) 139, note; 2 Bish. C. L. § 85, note; 2 Whart. C. L. § 2814; *Rex v. Vaughan*, 4 Burr. 2500-1; 3 Inst. 147; 2 Br. & Had. (Wait's ed.) 434, note; Mass. Gen. St. c. 163, § 9; [Rev. Stat. Ill. 1874, 356, § 31; 2 Comp. Laws Mich. 1871, §§ 7659, 7660; Code of Iowa, 1873, p. 613, §§ 3939, 3940; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 4. art. 2, §§ 9, 10.]

<sup>5</sup> 3 Inst. c. 63; Hawk. P. C. c. 38, § 1; 2 Whart. C. L. § 1531; 2 Bish. Cr. L. § 90

The meaning of *night time*, at common law, is when it is too dark to discern a man's face.<sup>1</sup> By the Massachusetts statute *night time* is defined to be between an hour after sundown, and an hour before sun rising.<sup>2</sup>

The place broken must be occupied as a dwelling, in order to have the act of breaking and entering burglary. But a temporary absence from the house by its inmates, during which it is entered, does not relieve the act from being burglary. If a tenant has hired a house and moved a portion of his goods into the same, but has never lodged in it, the breaking into it, in that condition, would not be burglary. But the mere casual sleeping in a building, as by a servant in a barn or warehouse to guard it, would not make it a dwelling house. A single room like a chamber in a college, or inn of court, in which the occupant is accustomed to lodge and sleep, is considered the dwelling house of the occupant, and the subject of burglary.<sup>3</sup>

So, if one has partially completed a house, and a person has slept in it to guard it, but the owner has not moved in or slept in it, it is not a dwelling house. But if a house be occupied by the wife, guest or servants of the owner, breaking and entering it would be burglary as to such owner, as would

<sup>1</sup> 4 Black. 224; East, P. C. 509.

<sup>2</sup> Gen. Stat. c. 172, § 13.

[By the act of April 10, 1877 (Sess. Laws, p. 85,) the Rev. Stat. of Ill. 1874, 357, § 36, were amended by omitting the words "in the night time."]

<sup>3</sup> East, P. C. 491, § 505; 3 Inst. 64, 65; 2 Whart. C. L. § 1568; 2 Bish. Cr. L. § 108.

be the case if the chamber of a guest at an inn were broken. If the owner let the entire building to separate lodgers, and does not occupy any part of it as a dwelling house, the breaking and entering would not be burglary as to him, but as to the lodger whose room was entered it would be. But if the owner occupied any part as a dwelling himself, it would be burglary as to him alone, and not as to the lodgers. And if two families occupy separate parts of the same house, and one part is broken into, it is burglary as to the occupant of that part.<sup>1</sup>

If there be a shop or out-house connected with a dwelling house, under the same roof, a breaking into one of these is a burglary, although there be no connecting passage between them. But if they are not under the same roof, nor within the same curtilage, or fence enclosing both, it would not be burglary to break into such shop or out-building. But it is said it would be, if they were parts of the same curtilage and inclosed by a common fence. The stat. of 7 Geo. 4, c. 29, requires, in such cases, a communication with the dwelling house immediate or by a covered and enclosed passage.<sup>2</sup>

As to the breaking, it may be an outer door or

<sup>1</sup> East, P. C. 498, 500, 505-6; 4 Black. (Shars. ed.) 224, note; 2 Bish. C. L. §§ 106-108.

[See 2 Whart. Cr. L. § 1568, where it is stated that it makes no difference (in cases where the residence of the lodger is permanent) that the owner occupies an apartment in the same building.]

<sup>2</sup> East, P. C. 493; 1 Bish. C. L. (4th ed.) § 302; 2 Whart. Cr. L. § 1557. See 2 Br. & Had. Com. (Wait's ed.) 511, note of American cases.

window. If the outer door or window through which the entry be made be open, and the one entering open an inner door to commit a felony, it would be burglary. So, if one like a servant who is in a house, breaks or opens a closed door into a room in the house, to commit a felony, it would be burglary. So, it would be to enter a house by the chimney, or by admission gained by fraud. Turning a key, raising a latch, or opening a window, would be a sufficient breaking, if followed by an entry into the house or room.<sup>1</sup> Breaking a twine netting fastened before an open window is a sufficient breaking.<sup>2</sup>

By the statute of Anne, if one who has committed a felony in a house, break out, in the night time, it is declared a burglary<sup>3</sup>.

As to what constitutes an entry, it is sufficient if any part of the body be within the house, as thrusting in a hand or foot, or putting in a hook to steal goods from the house<sup>4</sup>.

If the breaking and entry be to commit a misdemeanor only, it is not burglary.<sup>5</sup>

Entering a dwelling house in the night time without breaking, if with a felonious intent, or

<sup>1</sup> East, P. C. 485-488 ; 4 Black. 226, and note ; 2 Bish. Cr. L. § 91 ; 2 Whart. Cr. L. § 1532, *et seq.*

<sup>2</sup> Commonwealth v. Stevenson, 8 Pick. 354.

[See also Nolan v. The People, 22 Mich. 229 ; Dennis v. The People, 27 Mich. 151, raising a transom window.]

<sup>3</sup> East. P. C. 489 ; 2 Whart. Cr. L. § 1546. See also Mass. Gen. St. c. 161, § 10.

<sup>4</sup> East, P. C. 490 ; 4 Black. 226, and note ; 2 Br. & Had. Com. (Wait's ed.) 511, note ; 2 Bish. Cr. L. § 92.

<sup>5</sup> East, P. C. 509 ; 2 Bish. Cr. L. § 110 ; 2 Whart. Cr. L. § 1601 ; Commonwealth v. Newell, 7 Mass. 247.

breaking and entering in the day time a building or ship to commit a felony, the owner or any person being lawfully therein and put in fear thereby, is made burglary by statute in Massachusetts.<sup>1</sup>

CHEATS, or cheating, which comes within the category of crimes, by the common law, must be distinguished from private cheats which are effected by mere false promises to pay, or lying as to the quality of an article sold, and the like. It must be accomplished by fraud, and of such a nature as is calculated to be of public injury in its bearing and effect, and to deceive people in general. It is defined as consisting in the fraudulent obtaining the property of another by any deceitful and illegal *practice* or *token* short of felony, which affects or may affect the public.<sup>2</sup>

“Gross fraud or cheat at common law” is spoken of as a distinctive offense by the statute of Massachusetts, and punished as such. But the same statute, in another section, subjects to imprisonment as a crime the obtaining from another any property or his signature to any instrument the false making of which would be forgery, by a false pretense or by a privy or false token.<sup>3</sup> Under the head of cheats, therefore, will be included the offense of obtaining goods by false pretense.

<sup>1</sup> Gen. Stat. c. 161, § 13. For statutes of other States, see Whart. C. L. (6th ed.), §§ 1511-1530.

<sup>2</sup> East. Cr. L. 816-818; 2 Br. & Had. Com. (Wait's ed.) 466, note; Commonwealth v. Warren, 6 Mass. 72; People v. Babcock, 7 John. 201.

<sup>3</sup> Gen. St. c. 161, §§ 54, 58.

Cheating by use of false weights, or false measures is indictable at common law. So, if done by false tokens, which were some real visible marks or things, such as a key or ring, made use of before the general use of written orders, to indicate that the person possessing it may be trusted as coming from the owner of such token.<sup>1</sup> But obtaining goods by false pretenses is not an offense at common law.<sup>2</sup> It is held to be indictable as a cheat to induce an illiterate person to execute a deed to his prejudice by reading it to him in different words from such as are written in it.<sup>3</sup>

Both English and American statutes now make it indictable to obtain property of another by false pretenses, although no false token or symbol is employed. But in either case, to constitute a crime the person sustaining loss must have been induced by the false token or pretense to part with some right or thing of value, and be thereby defrauded.<sup>4</sup>

<sup>1</sup> *Commonwealth v. Warren*, 6 Mass. 72; *East*, C. L. 826-7; *People v. Bahcock*, 7 John. 204. See 1 Bish. Cr. L. § 571.

<sup>2</sup> *Commonwealth v. Call*, 21 Pick. 520.

<sup>3</sup> 2 Bish. C. L. (4th ed.) §§ 154, 158; *Hill v. the State*, 1 Yerg. 76, a promissory note.

The statute of Massachusetts punishes as a cheat the selling and conveying land which is incumbered or under an attachment without disclosing the fact to the purchaser if known to the vendor. Gen. Stat. c. 161, §§ 59, 60.

<sup>4</sup> 2 Bish. C. L. (4th ed.) §§ 157, 457; *id.* (6th ed.) § 415; *Commonwealth v. Drew*, 19 Pick. 182, 183; *Commonwealth v. Call*, 21 Pick. 520.

[See some of the statutes upon the subject in 2 Whart. C. L. § 2068, *et seq.*; Rev. Stat. Ill. 1874, 366, § 96, *et seq.*; Code of Iowa, 1873, 636, § 4073; 2 Comp. Laws Mich. 1871, § 7590.]

And such pretense must be a representation of some past event or existing fact or circumstance<sup>1</sup> calculated to mislead a person, or throw him off his guard, which is not true; and this must be known to the one making it, and must be made with a fraudulent intent. It requires some artifice, some deceptive contrivance. It does not regard naked lies as false pretenses. The false pretense may be made in any way in which ideas may be communicated by one person to another. Words are not essential. But the drawing of a check upon a bank in which the drawer has no funds, and presenting it to the bank which paid it, is not an indictable false pretense, although intended to defraud the bank. Nor did it make any difference that it was drawn in a false and assumed name, if the name had no influence in inducing the bank to pay the check. But if he had paid the check to a third party, knowing he had no funds, and that it would not be paid, it might have been a false pretense within the statute, although he made no oral declaration in respect to it.<sup>2</sup>

If the party alleged to be defrauded has the means in his hands of protecting himself against being deceived, and neglects to use them, the law will not interfere by way of indictment. So, if the pretense be absurd or irrational.<sup>3</sup>

<sup>1</sup> Bish. C. L. § 415.

<sup>2</sup> *Commonwealth v. Drew*, 19 Pick. 179; *Rex v. Jackson*, 3 Camp. 370.

<sup>3</sup> *Commonwealth v. Drew*, 19 Pick. 185; East, C. L. 828.

[See, however, 2 Bish. C.L. §§ 433, 436; Moore Cr. L. § 592, as to shallow pretenses, calculated, however, to mislead a weak mind.]

Among the acts which have been held to be false pretenses within the statute, is the passing as good a bill of a broken bank, known to be such by the payer, or any other worthless bill known to be such by the one who pays it.<sup>1</sup> Where one obtained a loan by fraud, and the lender delivered certain bank bills upon such loan, without expecting the same bills to be returned, it was held not to be larceny in the borrower, but the obtaining money by false pretenses.<sup>2</sup>

[So, a knowingly false representation, whereby one gains a credit, that he, or the firm of which he is a member, owes only a certain sum, or is pecuniarily sound, or is worth a certain amount of money, is a false pretense.]<sup>3</sup>

But the representation, to be criminal, must be more than an expression of opinion. A mere opinion is not a false pretense.<sup>4</sup>

The falsity of the pretenses must be proved, which were material in inducing a credit to be given or a sale of property to be made on the part of the person alleged to have been defrauded.<sup>5</sup>

<sup>1</sup> 2 Bish. C. L. (4th ed.) § 426.

<sup>2</sup> Kellogg v. The State, 26 Ohio St. 15; 24 Am. L. Reg. 499.

<sup>3</sup> [2 Bish. Cr. L. § 437; 2 Whart. Cr. L. § 2085, *et. seq.* By statute in Illinois (Rev. Stat. 1874, 366, § 97) such false representation is required to have been made in writing, and signed by the party making it. For further illustrations of false pretenses, see 2 Bish. Cr. L. §§ 415, 437, *et seq.*; 2 Whart. C. L. § 2092, *et. seq.*]

<sup>4</sup> 2 Bish. C. L. (4th ed.) 532, 433; *id.* (6th ed.) § 454.

<sup>5</sup> Commonwealth v. Davidson, 1 Cush. 43.

[As an absolute negative is generally incapable of proof, it will be sufficient for the prosecution to approximate to such neg-



To establish the criminality of a false pretense, so as to bring it within the statute, [it must have been a pretense of some existing or past fact];<sup>1</sup> it must have been [knowingly false<sup>2</sup> and] made with an intent to defraud;<sup>3</sup> it must have been the means by which the party making it obtained property or credit;<sup>4</sup> it must have been believed by the party who gave credit to it, or parted with his property;<sup>5</sup> and it must have been the cause of his parting with his property or his giving credit.<sup>6</sup>

CONSPIRACY is defined by the commissioners appointed to report a penal code for Massachusetts, to be "a malicious and fraudulent combination, confederation, association, agreement and mutual undertaking or concerting together of two or more to commit any crime or instigate any one thereto, or charge any one therewith, or to do what plainly and directly tends to excite to or occasion a crime, or what is obviously and directly injurious to another." Numerous cases are cited by them giving instances and examples wherein the various divisions of this general definition are illustrated, but which are too numerous to be referred to in detail. The definition of conspiracy, as given by Mr. Green-

ative, and it will suffice to show a strong probability of falsity.  
2 Whart. Cr. L. § 2110.]

<sup>1</sup> 1 Bish. Cr. L. § 415.

<sup>2</sup> 2 Bish. Cr. L. §§ 417, 471.

<sup>3</sup> 2 Bish. Cr. L. § 471.

<sup>4</sup> 2 Bish. Cr. L. § 460.

<sup>5</sup> 2 Bish. Cr. L. § 462.

<sup>6</sup> 2 Bish. Cr. L. § 461.

leaf, is substantially the same as given above, though not quite so much in detail.<sup>1</sup>

In § 90 of the volume cited, Mr. Greenleaf has collected a great variety of cases, illustrating the definition he has given, to which reference may be had for the requisite authorities. Among these may be mentioned a conspiracy or combination to perpetrate an offense which is already punishable by law. If, however, it be to commit a felony which is carried into effect, it is merged in the felony. But if it were to commit a misdemeanor, the conspiracy would not be merged in it, if perpetrated. Another would be, to injure a third party by charging him with a crime, or any other act tending to disgrace and injure him, or to extort money from him, or to defraud him of his property, or to ruin his reputation, trade or profession. Another would be, to obstruct, pervert or defeat the course of public justice, such as dissuading a witness from attending court, or giving evidence, or procuring false testimony, or publishing a libel, or a hand-bill with intent to influence the jurors who are to try a cause, or procure certain persons to be placed on a jury.<sup>2</sup>

It would be an indictable conspiracy to combine to do many acts, the doing of which would not, in themselves, be indictable, as to destroy the reputation of an individual by verbal calumny. The difficulty in defining the offense is in making it broad enough to include all cases which are punish-

<sup>1</sup> 3 Greenl. Ev. § 89; *Commonwealth v. Hunt*, 4 Met. 111.

<sup>2</sup> 3 Green. Ev. § 90.

able as conspiracies, without including acts which are not punishable.<sup>1</sup>

The indictment in *Commonwealth v. Hunt* was for a conspiracy of workmen not to work for any employer who should employ workmen not members of their association. The prosecution failed from a defective indictment. But the court held in the course of their opinion, that such combination would not be a criminal conspiracy unless it contemplated the doing an unlawful act, though it need not be an act which was indictable in itself. If, for example, it was a combination to break a contract then existing, as by a number of men in the employment of a farmer under a contract for a period not yet expired, to quit his service unless he raised their wages, it would be an unlawful conspiracy, although a leaving his service by any one of them would only subject him to a civil action in damages.<sup>2</sup>

The essence of the crime of conspiracy is the unlawful agreement and combination of the parties. It is not necessary to its consummation that any act should be done to carry it into effect. And on the other hand, if an unlawful act is proved to have been done by one or more of several persons, it would not constitute a conspiracy unless such conspiracy be charged in the indictment and unless

<sup>1</sup> *Commonwealth v. Hunt*, 4 Met. 123; 3 Chit. C. L. 1139, 1140.

[See Rev. Stat. Ill. 1874, 358 §§ 45, 46; Moore Cr. L. § 659, *et seq.*]

<sup>2</sup> 3 Chit. C. L. 1139; 2 Bish. C. L. (4th ed.), § 225; *id.* [(6th ed.), § 230. See Rev. Stat. Ill., 1874, 376, §§ 158, 159; Moore Cr. L., §§ 258, 661.]

it was done in pursuance of an unlawful combination to do it. The doing of the act is but evidence of the conspiracy.<sup>1</sup> So, there may be an unlawful conspiracy, though it be to do a lawful act by unlawful means.<sup>2</sup>

As a conspiracy consists in an unlawful combination of two or more persons, if two or more are joined in one indictment, and all but one are acquitted, the indictment fails as to him. But if one of two persons named in the indictment die before trial, it does not affect the prosecution against the survivor. So, one may be indicted alone by averring his conspiring with persons unknown, and if the conspiracy is established by proof, he may be convicted.<sup>3</sup>

If a conspiracy be established by proof, the acts and declarations of any of the conspirators done in pursuance of the unlawful combination, are received as evidence against his co-conspirators.<sup>4</sup>

COUNTERFEITING, when applied to the current coin of the State, is embraced in the same chapter of the statute of Massachusetts with forgery and offenses against the currency. By that statute, if one "counterfeits" any gold or silver coin current by law or

<sup>1</sup> 3 Greenl. Ev. § 91; 3 Chit. C. L. 1140; *Commonwealth v. Shedd*, 7 Cush. 515; *Commonwealth v. Hunt*, 4 Met. 132; 2 Bish. C. L. (4th ed.) § 191.

<sup>2</sup> Greenl. Ev. § 95.

<sup>3</sup> 3 Greenl. Ev. § 97; [2 Bish. C. L. (6th ed.) § 187, *et seq.* A conspiracy cannot be committed by a husband and his wife alone on account of their legal unity. 2 Bish. C. L. § 187; 1 Hawk. P. C. (Curw. ed.) 448, § 8.]

<sup>4</sup> 3 Greenl. Ev. § 94.

usage within this State, or has in his possession at the same time a certain number of pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be punished, etc.<sup>1</sup>

It has been gravely questioned whether, as by the Constitution of the United States, States are prohibited to coin money, or make anything but gold and silver coin a tender, and the power to do this, and regulate the values of foreign coin, was thereby given to the United States, it is within the power of a State to punish the counterfeiting of this, it being an offense against the sovereignty of the United States, both by the Constitution and statute of the United States.<sup>2</sup> The act of the United States of 1825, c. 65, punishes any person who shall falsely make, forge, or counterfeit any coin in the resemblance or similitude of the gold or silver coin which has been or hereafter may be coined at the mint of the United States, or in the resemblance or similitude of any foreign gold or silver coin, which now is, or hereafter may be, made current in the United States. But the Court of Massachusetts have held that having counterfeit coin in his pos-

<sup>1</sup> Gen. Stat. c. 162, §§ 14, 15.

[There are similar statutes in Illinois, Michigan and Iowa. Rev. Stat. Ill. 1874, 368, §§ 111, 112; Comp. Laws Mich. 1871, § 7645; Code of Iowa, 1873, p. 611, § 3925.]

<sup>2</sup> U. S. Const. Art. 1, §§ 8-10; *Fox v. State of Ohio*, 5 How. 410; *Mattison v. The State*, 3 Mo. 421; *The State v. Shoemaker*, 7 id. 177; *Rouse v. The State*, 4 Geo. 136.

session, with intent to utter the same as true, was an offense cognizable by the State Courts, for one reason, because it was an offense within that State, before the adoption of the Constitution of the United States, and the power to make and enforce such statute has never been denied by any competent tribunal.<sup>1</sup> [And according to the weight of authority, the States may constitutionally punish the counterfeiting of coin, as well as the passing of counterfeit money, notwithstanding such acts are also offenses against the United States.<sup>2</sup>]

As such an offense would be clearly in violation of the United States law, for which the party guilty of it would be liable to indictment in the Federal Courts, the danger of a double conviction by a State and Federal Court for the same offense, is avoided by the well settled principle that in such cases the court which first takes cognizance of the offense retains it to the exclusion of any other court.<sup>3</sup>

The coin mentioned in the statute, the counterfeiting or having which in possession, is declared

<sup>1</sup>Commonwealth *v.* Fuller, 8 Met. 313. The court cite the following cases sustaining the right of States to punish such acts: Chess *v.* State, 1 Blackf. 198; State *v.* Antonio, 2 Const. R. (S. C.) 776. And to these may be added: Sesemon *v.* State, 3 Head. 26; State *v.* McPherson, 9 Iowa, 53, 55. But it was held otherwise in Missouri, Mattison *v.* The State, 3 Mo. 421. Cases are also cited where States exercised the jurisdiction without any question being raised. See Moore Cr. L. § 574.

[<sup>2</sup> Fox *v.* State of Ohio, 5 How. 410, 435; United States *v.* Marigold, 9 id. 560; Harlan *v.* The People, 1 Doug. Mich. 207; 1 Bish. C. L. § 178; 2 id. § 285; Cooley Const. Lim. 18; Moore C. L. § 574; 2 Whart. C. L. § 1500.]

<sup>3</sup>Thurston *v.* Moore, 5 Wheat. 31.

an offense, must be such as is current by law in this State. Therefore the having in possession a counterfeit gold coin in similitude of one issued by the State of California, which by the constitution can not coin money, was held not to be within the statute.<sup>1</sup>

The knowingly uttering of counterfeit coin being a false token, would, however, as it seems, be indictable as a cheat at common law in the State Courts.<sup>2</sup> But as there is no criminal common law under the United States, the act complained of must come within the provisions of some statute to be indictable in the United States Court.<sup>3</sup>

The Statute of Massachusetts makes it an indictable offense to make any instrument designed for making counterfeit coin, or knowingly to have such instrument in his possession, with intent to use the same in coining such money. [Similar statutes also exist in other States.<sup>4</sup>]

EMBEZZLEMENT is declared by the Massachusetts statute to be simple larceny, but it is treated as a distinct offense. The language of the statute is "whoever embezzles or fraudulently converts to his

<sup>1</sup> Commonwealth *v.* Bond, 1 Gray, 584.

[The Statute of Illinois (Rev. Stat. 1874, 368, § 111) prohibits the counterfeiting of "any species of gold or silver coin, current by law or usage in this State, or any foreign State or country."]

<sup>2</sup> 2 Bish. C. L. (4th ed.) § 273; *id.* (6th ed.) §§ 286, 287.

<sup>3</sup> 2 Bish. C. L. (4th ed.) § 263; *id.* (6th ed.) § 281.

<sup>4</sup> Mass. Gen. Stat. c. 163, § 17; Rev. Stat. Ill. 1874, 368 § 113; 2 Comp. Laws, Mich. 1871, § 7648; Code of Iowa, 1873, p. 611, § 3924.

own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him which may be the subject of larceny," etc.<sup>1</sup> But it does not intend to merge the crime of embezzlement in that of larceny.<sup>2</sup> This is followed by clauses declaring what persons are subject to indictment for embezzlement, which embrace some who would not have been liable under previous statutes.<sup>3</sup>

The crime of embezzlement by bringing it within the category of larceny, was made such by statute to meet the case of unlawfully converting the property of another, where no trespass has been committed (which, by the common law, is essential to constitute a larceny), and also to embrace certain breaches of trust which were not indictable at the common law.<sup>4</sup> When, therefore, the offender has the qualified property and actual possession of the goods at the time of the alleged embezzlement, it would not be larceny at common law.<sup>5</sup>

Yet if the person who converts the specific prop-

<sup>1</sup> Gen. St. c. 161, § 25. [The Illinois statute contains a similar provision. Rev. Stat. 1874, 362, § 74. See, also, Sess. Laws Mich. 1875, p. 140.]

<sup>2</sup> Commonwealth v. Simpson, 9 Met. 142; Commonwealth v. King, 9 Cush. 287; 2 Bish. C. L. (4th ed.) § 332; ib. (6th ed.) § 327.

<sup>3</sup> §§ 37-41; Commonwealth v. Wyman, 8 Met. 259; Commonwealth v. Stearns, 2 Met. 346; Commonwealth v. Hays, 14 Gray, 64; Commonwealth v. Butterick, 100 Mass. 11.

<sup>4</sup> 2 Bish. C. L. (4th ed.) § 326; 2 Whart. C. L. § 1905; Commonwealth v. Stearns, 2 Met. 345; Commonwealth v. Hays, 14 Gray, 63-64.

<sup>5</sup> 2 Cooley's Black. 230, note.



erty of another, had possession of it for a special purpose, as a servant to carry from his master to the house of a friend, or a sum of money to be counted, or obtained possession by fraud with intent to steal it at the time of receiving it, it would be considered a larceny in the one making the conversion, since the owner never parted with the property in the goods, nor lost the constructive possession thereof.<sup>1</sup>

To constitute embezzlement, the one converting the goods or money of another, must, when doing it, sustain a fiduciary relation in respect to the same with the owner, and, in so doing, must be guilty of a breach of trust.<sup>2</sup> But if an auctioneer sells goods for cash, and fails to pay it over to the owner of the goods, it is not embezzlement, since his duty was to sell the goods, and the money received was his till he paid it over; he might mix it with his own, or deposit it in bank in his own name, and his use of it would not be embezzling another's money.<sup>3</sup> The same principle applies to commission merchants,<sup>4</sup> attorneys<sup>5</sup> and collectors of bills for a newspaper

<sup>1</sup> 2 Whart. C. L. §§ 1843, 1908; *Commonwealth v. King*, 9 Cush. 287, 288; *Kibs v. The People*, 81 Ill. 599; 8 Chicago Legal News, 335; 2 Cooley's Black. 229, 230, note; *Commonwealth v. Stearns*, 2 Met. 347; *Commonwealth v. O'Malley*, 97 Mass. 586; *Moore Cr. L.* 496.

<sup>2</sup> *Commonwealth v. Straus*, 2 Met., 345; *Commonwealth v. Hays*, 14 Gray, 64. See 2 Bish. C. L. § 352.

<sup>3</sup> *Commonwealth v. Straus*, 2 Met. 348. [See *Zschocke v. The People*, 62 Ill. 127, where a constable sold goods levied on by him, at private sale, and converted the proceeds to his own use.]

<sup>4</sup> See Rev Stat. Ill. 1874, 363, § 78.

<sup>5</sup> See *id.* § 79.

establishment; to use the money so collected is not embezzlement.<sup>1</sup>

By the statute cited (§ 41), carriers and all persons entrusted with property, who fraudulently convert the same, are liable for embezzling the same. Under this, it was held that if a servant, upon a check drawn by his master, and sent by him to the bank, obtain bills therefor, and fraudulently convert them, it would be embezzlement and not larceny.<sup>2</sup> But if one pays another money by mistake, and the receiver converts the same to his own use, it was held not such an entrusting and violation of a trust as to come within the category of embezzlement.<sup>3</sup>

An indictment for embezzlement must not only aver an entrusting of the goods with the party charged, but the purposes for which this was done, and must state the specific property alleged to have been embezzled, properly described.<sup>4</sup>

Embezzling several articles at the same time, may be treated as so many distinct acts of embezzlement. Where one received from another a note to get it discounted at a bank, and fraudulently procured it to be discounted on his own account, it was held to be an embezzlement of the note.<sup>5</sup>

<sup>1</sup> *Commonwealth v. Libbey*, 11 Met. 65.

<sup>2</sup> *Commonwealth v. King*, 9 Cush. 288; 2 Bish. C. L. (4th ed.) § 352.

<sup>3</sup> *Commonwealth v. Hays*, 14 Gray, 62, 65; 2 Bish. Cr. L. (4th ed.) § 346; *id.* (6th ed.) 355.

<sup>4</sup> *Commonwealth v. Smart*, 6 Gray, 15; *Commonwealth v. Merrifield*, 4 Met. 468.

<sup>5</sup> *Commonwealth v. Butterick*, 100 Mass. 9.

**FORCIBLE ENTRY AND DETAINER.** By the Massachusetts statute, persons are forbidden to make an entry into lands or tenements except in cases where their entry is allowed by law, and in such case they shall not enter with force. [Similar statutes are also in force in other states.]<sup>1</sup> But an unlawful entry made upon another's land with technical force, constitutes a trespass; but if not accompanied with other acts of force or violence, would not be an indictable offense.<sup>2</sup>

There are early English statutes against Forcible Entries, such as that of 5 Rich. II. st. 1, c. 8, and 8 Hen. 6, ch. 9. But it is held to be an indictable offense, both by statute and the common law.<sup>3</sup> In order to sustain an indictment for a forcible entry, the entry must be accompanied by circumstances tending to excite terror in the owner, and to prevent him from maintaining his right. There must be at least some apparent violence or some unusual trespass, or the parties attended with an unusual number of people, some menaces or other acts giving reasonable cause to fear that the party making the forcible entry will do some bodily hurt to those in possession, if they do not give up the same. It is the existence of such facts and circumstances connected with the entry, that removes it from the class

<sup>1</sup> Gen. Stat. Mass. c. 137, § 1; Rev. Stat. Ill. 1874, 335, § 1; 2 Comp. Laws, Mich. 1871, § 6695; Rev. Stat. N. Y. pt. 3, ch. 8, tit. 10, § 1.

<sup>2</sup> *Commonwealth v. Shattuck*, 4 Cush. 143; 2 Bish. C. L. (4th ed.) § 479; Hawk. P. C. ch. 64, § 25.

<sup>3</sup> *Commonwealth v. Shattuck*, *sup.* 144; 4 Cooley's Black. 148, note; 3 Chitty C. L. 1136; 2 Whart. Cr. L. § 2014.

of cases of civil injury.<sup>1</sup> The terror may be excited and the forcible entry made by a single person.<sup>2</sup>

The entry, to bring it within the law against forcible entry and detainer, must be made under a claim to the premises entered or sought to be entered by force. And if one having lawful possession of premises puts another in as keeper of the same, like a servant during his absence, who should resist his entry upon his return, it would not subject him to indictment for forcible entry if he broke in and regained possession by force, though it might not justify creating a riot to accomplish his purpose.<sup>3</sup>

A *forcible detainer* is where a man who has entered peaceably, maintains his position by force, as if he threatens to do bodily harm to any one who shall attempt to enter, or uses a larger quantity of arms than is usual for protection, or assembles a crowd of persons to repel the approach of others.<sup>4</sup> Forcible detainer was made an offense by statute, by act of 8 Hen. VI. ch. 9.<sup>5</sup>

Although as a general proposition, one upon

<sup>1</sup> Fifty Associates v. Howland, 5 Cush. 218; Meader v. Stone, 7 Met. 151; Commonwealth v. Shattuck, *sup*; Commonwealth v. Roby, 4 Allen, 319; 3 Chitty C. L. 1135; Hawk. P. C. ch. 64, § 26.

<sup>2</sup> 2 Bish. C. L. (4th ed.) § 481; Hawk. P. C. ch. 64, § 29.

<sup>3</sup> 2 Bish. C. L. (4th ed.) § 483. See Hawk. P. C. c. 64, § 32; 2 Whart. C. L. § 2039.

<sup>4</sup> 3 Chit. C. L. 1135 and note; Commonwealth v. Dudley, 10 Mass. 409; 2 Bish C. L. (4th ed.) § 486; Whart. C. L. §§ 2040, 2041.

<sup>5</sup> 3 Chit. C. L. 1136.

whom another has committed an act which is indictable, may have a civil action for the recovery of damages thereby sustained, it does not seem to hold good in the case of making a forcible entry, if in making it he exercises his right to regain possession wrongfully withheld from him, as when his tenant at will continues to hold premises after notice to quit. He may be liable to indictment for committing a breach of the peace by the manner in which he has exercised his right ; and yet, if in so doing he made use of no more force than was necessary to expel the person wrongfully in possession, he would not be liable in an action in damages for expelling him, though done with force.<sup>1</sup>

FORGERY is an offense both by statute and the common law, and is defined to be the fraudulent making or alteration of a writing to the prejudice of another man's right, and it may be committed of any writing which, if genuine, would operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railway pass, as well as a bill of exchange or other express contract.<sup>2</sup>

<sup>1</sup> *Commonwealth v. Haley*, 4 Allen, 318 ; 1 Wash. Real. Prop. (4th ed.) 621-627 ; *Stearns v. Sampson*, 59 Me. 563 ; *Clark v. Keliher*, 107 Mass. 409.

<sup>2</sup> 3 Greenl. Ev. §§ 102, 103 ; 2 Whart. C. L. § 1418 ; 4 Cooley's Black. 247, and note ; East, P. C. 852, 917, 923 ; *Commonwealth v. Ray*, 3 Gray, 446 ; *Commonwealth v. Ayer*, 3

Forgery may be committed by counterfeiting an instrument wholly printed or engraved, and on which there is no written signature personally made by the one to be bound, if it be printed or engraved, as in case of a railroad ticket.<sup>1</sup>

It is not necessary that the resemblance of the forged instrument to the genuine should be exact. If it be sufficiently alike to be calculated to deceive with the exercise of ordinary care and diligence, it will bring it within the crime of forgery.<sup>3</sup>

If one signs the names of fictitious parties to a note, there being no such parties, though done for the purpose of fraud, he would not be liable for forgery. As where A signed a note A and B, and represented that B was a partner, when there was no such person, though it was a fraud, it was held not to be forgery.<sup>3</sup>

It is not enough that one signs a false and forged paper, unless it be of such a character as to defraud or deceive one if used for that purpose. If it falsely affirms, as a fact, a matter which, if true,

Cush. 152; *Commonwealth v. Baldwin*, 101 Mass. 198; Mass. Gen. Stat. c. 162, § 1. See also Rev. Stat. Ill. 1874. 367, § 105; 2 Comp. Laws Mich. 1871, § 7631.

<sup>1</sup> *Commonwealth v. Ray*, 3 Gray, 447; *Wheeler v. Lynch*, 1 Allen, 402.

[Railroad tickets and passes are expressly mentioned in the Illinois statute. Rev. Stat. 1874, 367, § 105.]

<sup>2</sup> East, P. C. 858; 4 Cooley's Black. 247, note; *Commonwealth v. Stephenson*, 11 Cush. 481; 3 Greenl. Ev. § 105.

<sup>3</sup> *Commonwealth v. Baldwin*, 11 Gray, 197; 4 Cooley's Black 247, note.

[This is made a substantive offense by statute in Illinois. Rev. Stat. 1874, 368, § 107.]

would apparently be of no significance or importance, it would not constitute the crime of forgery.<sup>1</sup>

The essence of the crime is an intent to defraud. The writing another's name would not be a forgery if no one could be injured thereby, though it is not necessary in order to create the offense that any one should have been actually defrauded by it. Thus it is not forgery to fabricate a will of land having but two witnesses, when the law requires three.<sup>2</sup> It is not necessary to present or deliver the forged paper to any one as genuine to constitute the crime of forgery.<sup>3</sup>

An alteration of an instrument, in order to constitute the crime of forgery, must be in some material thing. Adding a word to it, which the law would supply, does not alter the legal effect of the instrument and would not amount to forgery.<sup>4</sup>

It is also made punishable as forgery by statute to make, alter, or counterfeit a public record or certificate of any clerk or register of any court or public office, where such certificate may be received as legal proof.<sup>5</sup>

Uttering and publishing a false and forged paper, knowing it to be such, is punishable at common law

<sup>1</sup> *Commonwealth v. Hinds*, 101 Mass. 209 ; *East*, P. C. 860.

<sup>2</sup> *4 Cooley's Black.* 247, note ; *3 Greenl. Ev.* § 103 ; *East*, P. C. 953.

<sup>3</sup> *Commonwealth v. Ladd*, 15 Mass. 527.

<sup>4</sup> *2 Bish. C. L.* (4th ed.) § 538 ; *2 Whart. C. L.* § 1438.

<sup>5</sup> *Mass. Gen. Stat.* c. 162, § 1 ; *Rev. Stat. Ill.* 1874, 367, § 105 ; *2 Comp. Laws, Mich.* 1871, § 7631 ; *Code of Iowa*, 1873, 609, § 3917 ; *Rev. Stat. N. Y.* pt. 4 ch. 1, tit. 3, § 25 ; *4 Cooley's Black.* 247.

as forgery, provided some fraud is perpetrated thereby. And such uttering by one knowing it to be false, is punished by statute as forgery.<sup>1</sup> By uttering is meant, offering to another with an intent to have the thing offered accepted.<sup>2</sup>

The making, altering, forging or counterfeiting bank bills, or having them in his possession with intent to pass them as true, knowing them to be forged, are made substantive offenses by statute in Massachusetts, [and also in other States.<sup>3</sup>] The similitude of the forged to the genuine bills need not be exact. It would be sufficient if they be *prima facie* fitted to pass as true.<sup>4</sup>

LARCENY, as defined by East (and his definition is adopted by Mr. Greenleaf), is "the fraudulent and wrongful taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his, the taker's, own use and make them his own property, without the consent of the owner."<sup>5</sup> This defines simple larceny, whereas there are classes of mixed or compound larceny where the taking is accompanied by circumstances of aggravation, such

<sup>1</sup> 3 Greenl. Ev. § 103; Mass. Gen. Stat. c. 162, § 2; Rev. Stat. Ill. 1874, 367, § 105; 2 Comp. Laws Mich. 1871, § 7632; Code of Iowa, 1873, 610, § 3918; Rev. Stat. N. Y. pt 4. ch. 1, tit. 3, § 39; 4 Cooley's Black. 247, note.

<sup>2</sup> 1 Bish. C. L. (4th ed.) § 321.

<sup>3</sup> Gen. Stat. Mass. c. 162, § 3-6; Rev. Stat. Ill. 1874, 367, § 106; 2 Comp. Laws, Mich. 1871, § 7634; Code of Iowa, 1873, 610, § 3920,

<sup>4</sup> 2 Bish. C. L. (4th ed.) § 551.

<sup>5</sup> East P. C. 524; 3 Greenl. Ev. § 150; 2 Whart. C. L. § 1750.



as stealing from the person or in a dwelling house, which are of a higher nature than a simple larceny, and must be charged accordingly.<sup>1</sup>

A larceny includes a trespass,<sup>2</sup> and necessarily implies an actual taking from the owner's possession against his will, of goods in which he has a property general or special. And the general property in goods draws after it the legal possession, though in the custody of a servant or agent, while the qualified property of a bailee, is a sufficient ownership as against a wrong doer.<sup>3</sup>

Hence, if the goods are in the hands of a bailor by the owner's consent, and he fraudulently converts them to his own use, it would not be larceny, because no trespass has been committed. But if the possession have been gained with a felonious intent by fraud and deceit, or by threats or duress, it would be otherwise. So, if the bailment be terminated before the act of larceny is committed by the wrongful act of the bailor, it would be larceny. As where a carrier broke open a box which he was carrying, and took the goods therein with a felonious intent, it was held to be larceny. But if he sells the entire package in its original state, it would bring it within the crime of embezzlement and not larceny.<sup>4</sup>

<sup>1</sup> 4 Black. Com. 229; 3 Greenl. Ev. § 152. See Rev. Stat. Ill. 1874, 377, § 167.

<sup>2</sup> 2 Bish. Cr. L. (6th ed.) § 835.

<sup>3</sup> 3 Greenl. Ev. § 161; 4 Cooley's Black. 230, note.

<sup>4</sup> 3 Greenl. Ev. § 162; 4 Cooley's Black. 230, note; 2 Bish. C. L. (6th ed.) §§ 833, 834; *Ex parte* Waddy Thompson, 24 Am.

The thing taken must be of the personal goods of another. Things real, or such as "savour of the realty," are not the subjects of larceny at the common law. The severing them and carrying them away, at the same time by one continued act, though an act of trespass, would not be larceny. But if severed at one time, and carried away at another and different time, it would become larceny, because by such severance they become personal chattels. But now, by statute, the stealing [of fixtures] fruit from orchards, vegetables from gardens, or trees or shrubs growing, and the like, is made larceny.<sup>1</sup>

The thing taken must be of some value, or it is not the subject of larceny, and value must be averred of the thing taken, in the indictment or it will be bad.<sup>2</sup>

As property cannot be predicated of animals *feræ naturæ*, they are not the subjects of larceny unless reclaimed or dead. But if reclaimed or confined, and may serve for food, as deer confined in a

L. Reg. 522, taking goods by fraudulent replevin may be larceny; 1 Hale's. P. C. 507; 3 Inst. 108.

<sup>1</sup> 4 Black. Com. 232, 233; 2 Whart. C. L. § 1753; Ewell on Fixtures, 449, *et seq.*; Mass. Gen. Stat. c. 161, § 25; Rev. Stat. N. Y. pt. 4, ch. 1 tit. 3. § 70; Rev. Stat. Ill. 1874, 378, §§ 173, 175; Rev. Code of Geo. § 2194; 3 Chit. C. L. 929; 3 Greenl. Ev. § 163; 2 Bish. C. L. (4th ed.) § 796, statute of South Carolina.

[The rule of the common law has been held not to apply to chattels only constructively annexed to the realty. Ewell on Fixtures, 451; Jackson *v.* State, 11 Ohio St. 104; Hoskins *v.* Tarrance, 5 Blackf. 417.]

<sup>2</sup> 3 Chit. C. L. 929; Hope *v.* Commonwealth, 9 Met. 134; Commonwealth *v.* Smith, 1 Mass. 245; Moore's Cr. L. § 507; 2 Whart. C. L. §§ 1837, 1838.

park, which may be taken at pleasure, or fish in a trunk, or bees in a hive, or doves in a dove-cote, or pigeon house, or in the nest before they are able to fly, and under the care of the owner, it would be larceny to take them if done feloniously.<sup>1</sup>

The flesh or carcasses of wild or domestic animals which have been killed, if of value, are the subjects of larceny. So are domesticated animals, if of any value for food or production, such as neat cattle, sheep, swine, poultry and the like. And a proper distinction is to be made in framing an indictment, between the larceny of a living animal and the flesh of a dead one.<sup>2</sup> It seems to be conceded by writers upon the criminal law, that the

<sup>1</sup> 4 Black. Com. 235; 2 Bish. C. L. (4th ed.) § 786, 789; 3 Chit. C. L. 930; 2 Whart. Cr. L. §§ 1754, 1755; Commonwealth *v.* Chace, 9 Pick. 15, which was a case for stealing tame doves, in which the Court say, "perhaps when feeding on the grounds of the proprietor, or nesting on his barn, or other buildings, if killed by a stranger, the owner may have trespass, and if the purpose be to consume them as food, and they are killed or caught or carried away from the enclosure of the owner, the act would be larceny," otherwise it would not be. See Rev. Stat. Ill. 1874, 377, § 171.

[Wild bees are not the subject of larceny while remaining in the tree where they hived. Wallis *v.* Mease, 3 Binn. 546. See Ewell on Fixtures, 243, and cases cited. Oysters planted in public waters, if not planted where oysters grow naturally, and if the spot is designated by stakes or otherwise so they can be readily distinguished from others in the same waters, are the subject of larceny State *v.* Taylor, 27 N. J. Law, 117. See, also, Reg. *v.* Downing, 23 L. T. N. S. 398.]

<sup>2</sup> 4 Black. Com. 236; 2 Whart. C. L. § 1755; 3 Greenl. Ev. § 163; 2 Bish. C. L. (4th ed.) §§ 786, 787; Commonwealth *v.* Beaman, 8 Gray, 497.

stealing of such domesticated animals as dogs, cats and the like, which do not serve for food, is not larceny at common law. In Massachusetts [and Illinois] it is made larceny by statute to take, with felonious intent, any beast or bird ordinarily kept in a state of confinement.<sup>1</sup>

The article taken must be the property of some person, known or unknown, in order to its being larceny to take it, and when one stole clothing from the body of one who had been drowned, it was held to be the property of his administrators, and to be so described in the indictment.<sup>2</sup>

*Choses in action*, like bonds, notes and bills, are not subjects of larceny at common law, but are made so by statute both in England and our own country.<sup>3</sup>

It would be larceny in one thief to steal goods

<sup>1</sup> 4 Black. 236 ; 2 Bish. C. L. (4th ed.) § 787 ; 2 Whart. C. L. § 1755 ; Gen. Stat. c. 161, § 30 ; Rev. Stat. Ill. 1874, 377, § 171.

[If such animals are taxed, they are subjects of larceny. 2 Whart. C. L. § 1755 ; *People v. Maloney*, 1 Park. C. C. 593.]

<sup>2</sup> 2 Bish. C. L. (4th ed.) § 800 ; *Wonson v. Sayward*, 13 Pick. 404.

[The property of a winding sheet and coffin remains in the executor, or other person who was at the charge of the funeral, and who had property therein when the dead body was wrapped therewith and inclosed therein ; and a stealing of such thing is a felony. *Hayne's Case*, 12 Co. 113 ; *Wms. Exrs.* (2d ed.) 505 ; 2 Whart. C. L. § 1823.]

<sup>3</sup> 2 Whart. C. L. § 1757 ; 2 Bish. C. L. (4th ed.) § 767 ; Mass. Gen. Stat. c. 161, § 18 ; Rev. Stat. Ill. 1874, 377, § 167 ; 2 Comp. Laws, Mich. 1871, § 7569 ; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 3, § 68 ; Code of Iowa, 1873, 606, § 3902.

from another who had himself stolen them. And a man may commit larceny by stealing his own goods in possession of another, though his servant, if done with a felonious intent.<sup>1</sup>

To constitute larceny of goods, there must be a taking and removing them with a felonious intent. The removing must be actual from the place which the thing occupied, and it must be severed from the possession or custody of the owner, and come into possession of the thief. Thus, setting a bag of grain on end, but not raising it from the place it occupied, would not be a taking; if it had been raised from the floor, but the thief was prevented from carrying it away, it would be. So, taking an article from the counter of a store which was fastened to it by a string which remained unbroken, or, where a purse attached to a bunch of keys was snatched from the owner's pocket, but the keys remained in the pocket, it would not be larceny, there being no separation of the article from the owner's possession.<sup>2</sup>

As there must be a trespass committed to constitute a larceny, if the owner voluntarily parts with possession of his goods to another, no subsequent wrongful conversion would change the taking into larceny. Thus, if one hires a horse and then sells him before the time of the hiring has expired, it would not be larceny, unless he, intending to sell

<sup>1</sup> 2 Bish. C. L. (4th ed.) §§ 794, 801; 1 Hale P. C. 507; 4 Cooley's Black. 231, note; 2 Whart. C. L. §§ 1807, 1808, 1822, 1831.

<sup>2</sup> 3 Greenl. Ev. §§ 154, 155; 2 Bish. C. L. (4th ed.) § 804; 2 Whart. C. L. § 1810; 4 Cooley's Black. 231, note.

and convert the horse to his own use, resorted to hiring as a means of obtaining possession of it, and the owner only intended to part with possession by the way of hire.<sup>1</sup> But if the owner voluntarily parts with possession of goods upon sale, although it be by reason of false pretenses, the property will so far pass that a *bona fide* purchaser will hold them against the vendor.<sup>2</sup>

If one finds goods which have been lost and does not know to whom they belong, and converts them to his own use, it would not be larceny. But if, knowing whose they are, he converts them, it seems that it would be. So, where one left his pocket book upon the counter in another's store who converted it to his own use.<sup>3</sup> So, where one to whom a bureau was delivered to be repaired, opened a secret drawer in it and took out a sum of money, it was held to be larceny.<sup>4</sup> Stealing food, even to relieve hunger, is larceny.<sup>5</sup>

Mere taking property and using it, is not larceny, though it be by an act of trespass, unless it be done

<sup>1</sup> 2 Bish. C. L. (4th ed.) § 847; East's P. C. 672; 2 Whart. C. L. § 1847; 4 Cooley's Black. 230 note.

<sup>2</sup> Cochran v. Stewart, 21 Minn. 435. See, also, Fawcett v. Osborn, 32 Ill. 411; Bell v. Farrar, 41 id. 400; Chicago Dock Co. v. Foster, 48 id. 507; Ohio & M. R. R. Co. v. Kerr, 49 id. 458; Mich. Cent. R. R. Co. v. Phillips, 60 id. 190; 2 Whart. C. L. § 1850.

<sup>3</sup> 2 Bish. C. L. (4th ed.) §§ 858, 860, 861; 2 Whart. C. L. § 1792; East's P. C. 664; 3 Greenl. Ev. § 159; 4 Cooley's Black. 231, note.

<sup>4</sup> 3 Greenl. Ev. § 159; 2 Whart. C. L. § 1793. See Durfee v. Jones, 16 Alb. L. J. 368.

<sup>5</sup> 1 Hale. P. C. 54.

with a felonious intent to make it his own, or convert it to his own use as property; as where one took another's plough and used it and returned it, or took another's horse and rode it and then abandoned it or returned it to the place from which he took it, or took them under a claim of title.<sup>1</sup>

Although the owner of property loses the actual possession of it by the larceny of another, he does not lose his property in the article stolen, and the law draws the possession to the property; so that if the thief takes the goods in one county and carries them into another, in the same State, he may be indicted in the latter county for having stolen the articles there. It is, as to the owner, a felonious taking of his goods in the latter county, so that he may be indicted in either.<sup>2</sup>

So, it has been held in some of the States that if one steals property in one State and brings it into another, he may be indicted in the latter State; but it has been held otherwise in other of the States. The States where this right is maintained, as given in *Commonwealth v. Uprichard*, are Massachusetts, Maryland, Ohio, Vermont, and Connecticut, and Mr. Bishop adds Maine and Mississippi. But it is denied in Pennsylvania, North Carolina, Tennessee, New Jersey, Indiana, and Louisiana. By statute such person is made liable in the State to which he

<sup>1</sup> 1 Hale P. C. 509; 4 Black. 232; 2 Whart. C. L. §§ 1772, 1773; 2 Bish. C. L. (4th ed.) §§ 864, 868; 3 Greenl. Ev. § 157.

<sup>2</sup> *Commonwealth v. Rand*, 7 Met. 476; *East*, P. C. 771; 1 Bish. C. L. (4th ed.) § 109; Moore, C. L. p. 340, note 1, §§ 505, 762.

brings the goods, in New York, Alabama, [Illinois, Michigan, and] Missouri.<sup>1</sup>

But, if the goods have been stolen in a foreign jurisdiction, and brought into the State, the courts of Massachusetts hold that it would not be larceny here, while Maine holds that it would be. In the case in Massachusetts the taking was in Nova Scotia, and the goods were brought to Boston.<sup>2</sup> But, if one steals a live animal in one State, and kills it there, and then brings it, in that condition, into another State, the charge of larceny in the latter State must conform to the condition of the animal after it had been killed. Thus, to allege that one had stolen a turkey in the second State, would imply a live one; and if killed before brought into it, the

<sup>1</sup> Rev. Stat. Ill. 1874, 407, § 399; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 7, § 4; 2 Comp. Laws Mich. 1871, § 7606; *Commonwealth v. Uprichard*, 3 Gray, 434; *Commonwealth v. Andrews*, 2 Mass. 14; 1 Whart. C. L. § 2104; 2 id. § 1816; 1 Bish. C. L. (4th ed.) 109. The Massachusetts doctrine was reaffirmed by the Court in *Commonwealth v. Holden*, 9 Gray, 7, although Thomas, J., gave an able and elaborate opinion to the contrary.

[See *Morrissey v. People*, 11 Mich. 327, in which the Court were equally divided as to whether the State could lawfully provide for the punishment in Michigan of persons who, having committed larceny in a foreign country, bring the stolen property into the State. In *People v. Williams*, 24 Mich. 156, where the larceny was committed in another State, the power was sustained. See also Cooley's Const. Lim. \*128, and note.]

<sup>2</sup> *Commonwealth v. Uprichard*, 3 Gray, 434; *State v. Underwood*, 49 Maine, 181; 1 Bish. C. L. (4th ed.) § 109; *State v. Bartlett*, 11 Verm. 650, sustaining the doctrine of Maine. See note 1, *supra*.



indictment would be bad in not describing the article stolen as a dead turkey.<sup>1</sup>

There is no distinction in Massachusetts between grand and petit larceny as classes of offenses, nor is it retained in England. But the extent of the punishment is made to depend somewhat upon the value of the property stolen.<sup>2</sup> But the distinction between "simple and compound larceny" is retained; the one being larceny of goods without any circumstances of aggravation; the other being aggravated by the circumstance of place, or the mode of perpetrating it, as stealing in a dwelling house, or from the person, and the like, but not so far as to constitute burglary or robbery, which constitute a higher class of offenses than larceny. The distinction between simple and compound larceny is made by statute.<sup>3</sup>

By statute in Massachusetts [and Michigan] if any one is convicted of three [distinct] larcenies, either as principal or accessory [before the fact], at the same term of the court, he is to be adjudged a "common and notorious thief," and is subjected to a much severer punishment than for single acts of larceny.<sup>4</sup>

<sup>1</sup> *Commonwealth v. Beaman*, 8 Gray, 497; 2 Whart. C. L. § 1813.

<sup>2</sup> Gen. Stat. c. 161, § 18; 1 Bish. C. L. (4th ed.) §§ 621, 622. See Rev. Stat. Ill. 1874, 377, § 168; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 3, § 65; 2 Comp. Laws Mich. 1871, § 7569; Code of Iowa, 1873, 606, § 3902.

<sup>3</sup> Black. Com. 239; 2 Bish. C. L. (4th ed.) § 881; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 3, §§ 66, 67; Mass. Gen. Stat. c. 161, § 14-17; Code of Iowa, 1873, §§ 3903-3905; 2 Comp. Laws, Mich. 1871, §§ 7566-7568, 7620, stealing from car detained by accident.

<sup>4</sup> Mass. Gen. St. c. 161, § 22; 2 Comp. Laws, Mich. § 7570.

*Receiving Stolen Goods.* This offense, though once considered as the act of an accessory to the crime of larceny, is now treated as a substantive crime in itself, and may be punished, although the principal thief may not have been convicted.<sup>1</sup>

To constitute the offense, the receiver must know them to have been stolen, nor does it matter what his motives in receiving them were; it need not be personal gain or benefit. And the receiving must be from the one who committed the larceny, and not from some one who had previously received them from the thief. The statute covers buying, receiving or aiding in concealing stolen goods.<sup>3</sup>

A husband may be indicted as a receiver of goods stolen by his wife in his absence.<sup>3</sup> [But a conviction cannot be had against the wife for receiving goods stolen by her husband.]<sup>4</sup>

**LIBEL.** Though no statute in Massachusetts has ever declared a libel an indictable offense, it is such by the common law.<sup>5</sup> It has been found difficult to define it with precision, but its criminality will

<sup>1</sup> 1 Bish. C. L. (4th ed.) § 638; 2 do. § 1092; Mass. Gen. Stat. c. 161, §§ 41, 45, including the receiving of embezzled goods; Rev. Stat. Ill, 1874, 388, §§ 239, 241; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 3, § 73; 2 Comp. Laws Mich. 1871, § 7551; Code of Iowa, 1873, 608, § 3911.

<sup>2</sup> 2 Bish. C. L. (4th ed.) §§ 1093, 1095; Mass. Gen. Stat. c. 161, § 43; 2 Comp. Laws Mich. 1871, § 7551; Code of Iowa, 1873, 608, § 3911; Rev. Stat. Ill, 1874, 288, § 239.

<sup>3</sup> 2 Bish. C. L. (4th ed.) § 1095 a; 2 Whart. C. L. § 1896.

<sup>4</sup> 2 Whart. C. L. § 1896.

<sup>5</sup> *Commonwealth v. Chapman*, 13 Met. 68; 2 Whart. C. L. § 2535.

be found to consist in its tendency to cause a commission of crimes by others, or corrupting the morals of others, or instigating sedition against the government.<sup>1</sup>

It is defined by one writer, when it affects individuals, as "a malicious defamation expressed in printing, or writing, or signs, or pictures, tending to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby expose him to public contempt and ridicule."<sup>2</sup> As defined by Story, J., it is any publication, the tendency of which is to degrade or injure another person, or to bring him into contempt, ridicule or hatred, or which accuses him of an act odious or disgraceful in society."<sup>3</sup>

To constitute an indictable offense, the publication of the libelous charge must be other than by word spoken. These, though actionable, are not the subjects of an indictment.<sup>4</sup> The publication may be in various ways, by writing, printing, signs or pictures, caricatures, and the like, such as exhibiting a pillory or gallows<sup>5</sup>. Upon the matter of publication, it would be sufficient to address the libel in

<sup>1</sup> 1 Bish. C. L. (4th ed.) § 665; 2 Bish. C. L. § 898.

<sup>2</sup> 1 Russ. C. (Greave's ed.) 321; *Commonwealth v. Clapp*, 4 Mass. 168; *Commonwealth v. Holmes*, 17 Mass. 336; 3 Greenl. Ev. § 164; Rev. Stat. Ill. 1874, p. 378, § 177; Code of Iowa, 1873, 641, § 4097.

<sup>3</sup> *Dexter v. Spear*, 4 Mason, 15; *Clark v. Binney*, 2 Pick. 115.

<sup>4</sup> Russ. Cr. (Greave's ed.) 343. See, however, 2 Whart. C. L. § 2541.

<sup>5</sup> *Ellis v. Kimball*, 16 Pick. 132, a lithograph caricature; 3 Greenl. Ev. § 165; *De Bost v. Beresford*, 2 Comp. 511, a paint-

the form of a letter, if it reach the person libeled; or a letter to the wife of a person libeled, or the delivery of a letter to a party to be opened in another county, would be a publication where it was delivered, and if opened in the other county it would be a publication in either. And one who procures another to publish a libel is as guilty of publication as if done by himself.<sup>1</sup> So, printing a libel in a newspaper in one State which circulates in another, is a publication in the latter State.<sup>2</sup>

Ordinarily the publisher of a newspaper is responsible for the publication of a libel in his paper, although done by his servant unknown to him. So, with the sale of a libelous print in a shop by a servant.<sup>3</sup>

Although there must be malice in a writing and publication to constitute a libel, it is not necessary to show that it was done with hatred or ill will, since, in law, malice is a wrongful and unlawful purpose, or the willful doing of an injurious act without a lawful excuse.<sup>4</sup> If in its character a pub-

ing; *Austin v. Culpepper*, Skin. 127, representation of a pillory; 2 Whart. C. L. §§ 2536, 2541a.

<sup>1</sup> 1 Russ. Cr. (Greave's ed.) 356, 365; 3 Greenl. Ev. § 169-173; *Wood v. Smith*, 2 Bing. 749.

<sup>2</sup> *Commonwealth v. Blanding*, 3 Pick. 311.

<sup>3</sup> Russ. C. (Greave's ed.) 357; 3 Greenl. Ev. § 170; 2 Whart. C. L. § 2583.

<sup>4</sup> *Alderman v. French*, 1 Pick. 7; *Commonwealth v. York*, 9 Met. 104; *Commonwealth v. Bonner*, 9 Met. 412; *Commonwealth v. Snelling*, 15 Pick. 340; *Townshend on Slander and Libel*, 139, § 90; *Moore*, C. L. § 733. See 2 Whart. C. L. § 2582.

lication is libelous, the law presumes malice and it need not be proved.<sup>1</sup>

In order to have a publication criminally libelous by its reflection upon the dead, it would seem to be necessary that there should be persons living who, as family friends of the dead, would thereby be stirred up to the commission of a breach of the peace to avenge the injury.<sup>2</sup> So, if one repeats a fact found in history, supposing it to be true, it would not be a libel, as where a minister in preaching, drew an illustration from Fox's Martyrs, of the manner in which the Lord had caused the death of one G. as a persecutor, who happened to be present and heard the sermon.<sup>3</sup>

Although in the case of criminal prosecutions, there was much in the common law to justify the soundness of the dogma, "the greater the truth, the greater the libel,"—and such the law now is in many of the States, where the publication is not justifiable by having been made from proper motives—, if made from good motives and justifiable ends, and if it is true, it is a complete defense by [Constitution or] statute in all the States, and substantially so in England.<sup>4</sup>

<sup>1</sup> Commonwealth v. Blanding, *supra.*; Commonwealth v. Snelling, *sup.*; Brown v. Croome. 2 Stark, 297; 1 Russ. C. 368; Rex v. Woodfall, 5 Burr, 2667; Moore, C. L. § 733.

<sup>2</sup> Topham's case, 4 Term. 126; 2 Bish. C. L. (4th ed.) § 925.

<sup>3</sup> Brook v. Montague, Cro. Jac. 91.

[<sup>4</sup> Cooley's Const. Lim. \* 464; Const. Ill. 1870, Art. 2, § 4; Rev. Stat. Ill. 378, § 179; Const. Mich. Art. 6, § 25; Const. N. Y. Art. 1, § 8; Rev. Stat. N. Y. pt. 1, ch. 4, § 21; Code of Iowa; 1873, 641, § 4099.]

It was stontly maintained by the English courts that whether a publication, under a given state of facts, was libelous or not, was a question of law for the courts to determine, and that the province of the jury was limited to the fact of the publication and the trnth of the inuendo, without taking the motives of the defendant in making it into consideration. This led to the famous controversy between Mr. Erskine and the court, in the case of the Dean of St. Asaph, which resulted in Fox's Bill in Parliament, giving juries a right to render a general or special verdict as they should see fit, declaring him guilty or not guilty in view of all the facts, or to report the facts, and leave it to the court to say whether they constituted the gravamen of the crime charged.<sup>1</sup>

In a civil action for slander or libel, trnth forms a complete answer to plaintiff's declaration.<sup>2</sup>

Independent of statute provisions, the fact that what is published is true, is no defense in a trial upon an indictment for a libel, unless there be a justifiable cause for the publication. Thus, for example, the exposure of family tronbles, the faults

<sup>1</sup> 1 Russ. Cr. (Greave's ed.) 323; 4 Cooley's Black. 151, note; 3 Greenl. Ev. § 176; Cooley's Const. Lim. \*462; *Alderman v. French*, 1 Pick. 6.

[See Rev. Stat. Ill. 1874, p. 411, § 431; Code of Iowa, 1873, 641, § 4102; Const. N. Y. Art. 1, § 8; Rev. Stat. N. Y. pt. 1, ch. 4, § 21; Const. Mich. Art. 6, § 25.]

<sup>2</sup> Stark. on Slander, 239; 2 Bish. C. L. (4th ed.) § 909; Cooley's Const. Lim. \*464; 2 Greenl. Ev. § 425; Mass. Gen. Stat. c. 129, § 77, unless malice is proved; see Rev. Stat. Ill. 1874, 992, § 3; Const. Ill. 1870, Art. 2, § 4.

of childhood long forgotten, and the like, tending to give pain to the party or bring him into disgrace, are not justifiable.<sup>1</sup>

The English Stat. 6 and 7 Vict. c. 96, allows the truth to be given in evidence in defense in a trial for a libel, "provided it is for the *public benefit* that such matter should be published."<sup>2</sup> In Massachusetts the truth may be given in evidence upon a trial for a libel, "unless on the trial, malicious intention is proved."<sup>3</sup>

In several of the States, some by their constitutions, and some by statute, the truth is made a justification for publishing what is charged as a libel. But Mr. Greenleaf suggests that this ought to apply to libels defamatory of the person and not to scandalous libels of a more general character. The States adopting this doctrine, as given, are: Vermont, Maryland, North Carolina, Tennessee, Arkansas, and Illinois<sup>4</sup> with some qualifications. In other States, in order to have the truth a justification, the publication must be matter which is proper for public information, while others require that it

<sup>1</sup> Russ. Cr. (Greave's ed.) 323.

<sup>2</sup> Greenl. Ev. § 176; 1 Russ. Cr. 323.

<sup>3</sup> Gen. Stat. c. 172, § 11; c. 129, § 77.

[<sup>4</sup> By the Revised Statutes of Illinois of 1845, (Criminal Code, § 120,) "in all prosecutions for a libel, the truth thereof may be given in evidence in justification, except libels tending to blacken the memory of the dead, or expose the natural defects of the living." But by the Constitution of 1870, Art. 2, § 4, and Rev. Stat. 1874, p. 378, § 179, it is provided that "in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."]

should be published from good motives and justifiable ends, so that, with some limitations, the truth may justify the publication of what might otherwise be punishable as a libel.<sup>1</sup>

The statute of Massachusetts, moreover, gives juries in trials for libels, as well as for other crimes, a right to return a general verdict, or a special one, at their election, [and the same rule has been prescribed by constitution or statute in other States.]<sup>2</sup>

There are some matters, the publication of which is not punishable, although it may affect others, being what are called privileged communications. Among these are fair and true statements of proceedings in courts of justice, or by legislative assemblies, and communications made in good faith respecting candidates for office, to those who are to act upon their election or appointment, such as ministers of congregations, teachers of schools, and the like.<sup>3</sup>

MALICIOUS MISCHIEF is defined to be "the willful destruction of some article of personal property from actual ill will or resentment towards its owner."<sup>4</sup>

<sup>1</sup> Greenl. Ev. § 177, and note.

<sup>2</sup> Gen. Stat. Mass. c. 173, § 15; 3 Greenl. Ev. 179, note; [Cooley's Const. Lim. 460; Rev. Stat. Ill. 1874, 411. § 431; Code of Iowa 1873, 641, § 4102; Const. N. Y. Art. I, § 8; Const. Mich. Art. 6 § 25.]

<sup>3</sup> Cook v. Hill, 3 Sandf. 350; Cooley's Const. Lim. \*425, 431; 2 Bish. C. L. (4th ed.) § 906-908; 3 Whart. C. L. §§ 2569, 2573; Bodwell v. Osgood, 3 Pick. 376; Commonwealth v. Clapp, 4 Mass. 163.

<sup>4</sup> 2 Bish. C. L. (4th ed.) § 955.



It covers a numerous class of wrongful acts, and is an offense both at common law and by statute. Mr. Wharton has collected the statutes of the several States upon the subject, and treats also of the offense at the common law.<sup>1</sup>

Trespasses to real estate, maliciously done, are, by statute, included within the offenses of malicious mischief. Some of the offenses mentioned in the Massachusetts statute upon the subject, which are mentioned here by the way of example, are the breaking down or removing the boundary monuments of towns or lots of lands, destroying mile-stones or guide-boards, destroying lamps, and the like, injuring or defacing school-houses or churches, breaking down dams, gates, flumes or flashboards, drawing off the waters of mill ponds, killing and maiming horses, cattle, and the like, cutting down trees or girdling or injuring fruit or ornamental trees, and the like.<sup>2</sup>

HOMICIDE, MURDER, MANSLAUGHTER. *Homicide* is the general term for all acts of taking life committed by one man upon another, but as, in some cases, this may be justifiable or excusable, relieving it thereby from criminality, it is only when it is feloniously done that the law takes cognizance of it as a crime. And felonious homicides are di-

<sup>1</sup> 2 Whart. C. L. §§ 1943-2012. See also 2 Bish. C. L. (4th ed.) §§ 955-966.

<sup>2</sup> Mass. Gen. Stat. c. 161, § 67-85. See, also, Rev. Stat. Ill. 1874, 379, § 186, *et seq.*; 2 Comp. Laws. Mich. 1871, § 7596, *et seq.*; Code of Iowa, 1873, § 3977 *et seq.*; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 6, § 62.

vided into two classes, of which it is proposed now to treat in their order, Murder and Manslaughter.<sup>1</sup>

*Murder*, as defined by East, is "the voluntary killing any person (which extends not to infants *in ventre sa mere*,) under the king's peace, of malice pre-pense or aforethought, either express or implied by law." He adds that the sense of this word "malice" is not confined to a particular ill will to the deceased only, but is intended to denote an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate, cruel act against another, however sudden.<sup>2</sup>

As has already been stated, there are degrees in the crime of murder recognized by the statutes of some, if not all, the States. Those of Massachusetts, Maine, Pennsylvania,<sup>3</sup> New Hampshire, Ohio, Virginia, New York,<sup>4</sup> New Jersey, Alabama, and Tennessee, make two degrees. Such also is the law of Michigan.<sup>5</sup> Its bearing is chiefly, if not wholly, upon the degree of punishment to which the offender is subjected. In Massachusetts, murder in the first degree is limited to acts committed with

<sup>1</sup> 3 Chit. C. L. 723; 1 Hale, P. C. 424; 3 Greenl. Ev. § 114, 115, 118, 119; East, C. L. 198, 214; Co. 3d Inst. 54.

<sup>2</sup> East, C. L. 214, 215; Foster, C. L. 138.

<sup>3</sup> Act of April 22, 1794, § 2.

<sup>4</sup> Rev. Stat. N. Y. (6th ed. Bank's and Bros.) pt. 4, ch. 1, tit. 1, §§ 4, 5, Act of May 29, 1873.

<sup>5</sup> Comp. Laws, Mich. 1871, §§ 7510, 7511.

deliberately premeditated malice aforethought, or in the commission of or attempt to commit any crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty; and is punishable with death. If it is of the second degree, it is punishable by imprisonment for life.<sup>1</sup> So, murder committed in an attempt to commit a crime punishable by imprisonment for life, would be in the first degree, although the punishment for such attempted crime was one which might be punished by imprisonment for life or by a lighter one, at the discretion of the Court.<sup>2</sup>

At common law, if one commit a homicide while attempting to commit a felony, it would be murder, although wholly unintentional, as shooting at another's fowls in order to steal them, and killing a man whom he did not see.<sup>3</sup> So, if with intent to murder A, one strikes or fires at him and misses him, but kills B, it would be murder of B. Or if one lays poison for a man intending to kill him, and another takes it by mistake, and dies, it would be murder.<sup>4</sup> The distinction now made between the cases above supposed is, if the homicide results from an attempt to commit an offense punishable with death or imprisonment for life, it would, [under the Massachusetts statute,] be murder [in the

<sup>1</sup> Mass. Gen. Stat. c. 160, §§ 1, 4, 5. See the statutes collected and considered in 2 Whart. C. L. (6th ed.) §§ 1075-1080; 2 Bish. C. L. (4th ed.) § 745; id. (6th ed.) § 723.

<sup>2</sup> *Commonwealth v. Pemberton*, 118 Mass. 36.

<sup>3</sup> East, P. C. 255.

<sup>4</sup> East, C. L. 230; 1 Hale P. C. 431; 4 Black. Com. 201; 2 Whart. C. L. § 965.

first degree]. If the crime attempted, be of a lower degree, it would be murder in the second degree.<sup>1</sup>

It seems to be murder, if one kills another by his wrongful act, however the killing be effected. It may be by exposing an infant or impotent person to the weather, by starving him, by blows, by poisoning, and the like.<sup>2</sup>

It is not necessary that the one who kills another should have any special malice towards him; thus, if one throws a heavy timber from a roof into a crowded street, or shoots into a crowd, intending to kill some one, and causes the death of a person, it is murder; it is a sufficient indication of general malice, though the man killed be a stranger to him.<sup>3</sup>

Counseling a man to commit suicide, and being present at the act done, would be murder.<sup>4</sup> So, killing another at his solicitation and request, is murder.<sup>5</sup>

If one inflicts a wound upon another not in itself fatal, but it becomes so from the manner in which it is treated, it is not murder. But, if the wound is a fatal one if not attended to medically, and such attention is not given, and the wounded man dies,

<sup>1</sup> [See this subject considered with reference to the statutes of the different States, in 2 Whart. C. L. § 1081, 1107; 2 Bish. C. L. (6th ed.) § 723, *et seq.*]

<sup>2</sup> 1 Hale's P. C. 431, 432; 4 Black. Com. 196; 3 Chit. C. L. 725.

[See Rev. Stat. Ill. 1874, 374, § 140; *id.* 374, § 13, murder by arson; *id.* 387, § 226, murder by perjury.]

<sup>3</sup> East, C. L. 231; 2 Whart. C. L. § 967.

<sup>4</sup> *Commonwealth v. Bowen*, 13 Mass. 359.

<sup>5</sup> 4 Cooley's Black. 189, note.

it would be murder. In the one case, death is not caused by the wound; in the other it is.<sup>1</sup>

If one, in resisting an officer in the execution of a lawful process of arrest, kills him, it is murder. But, if the process be defective so as to make its service illegal, it would be only manslaughter, [unless the evidence shows previous or express malice.<sup>2</sup> If, however, it appears that the slayer was actuated by previous or express malice, the killing would be murder, notwithstanding the illegality of the attempted arrest.<sup>3</sup>]

If death does not follow within a year and a day from the time of inflicting the wound, or doing the act which causes it, the law presumes it was not occasioned thereby, and does not bring it within the category of murder.<sup>4</sup>

If the blow of which the person dies be inflicted in one county, or the shot which wounds is fired in that county, and he dies in another, the person inflicting it or discharging the gun may be tried in either.<sup>5</sup> The law as above stated, is enacted as a statute in Massachusetts [and Michigan,] and the same rule is applied where the blow is given in an-

<sup>1</sup> 1 Hale P. C. 428; *Commonwealth v. Costley*, 118, Mass. 27.

<sup>2</sup> *Rafferty v. People*, 69 Ill. 111; s. c. 72 Ill. 37; 18 Am. Rep. 606.

<sup>3</sup> *Rafferty v. The People*, *supra*.

<sup>4</sup> 3 Inst. 47, 53; Rev. Stat. Ill. 1874, 374, § 147. If the stroke be given on the first day of January the year ends on the thirty-first of the next December. *Commonwealth v. Parker*, 2 Pick. 558.

<sup>5</sup> 3 Greenl. Ev. § 143, and note; *Commonwealth v. Parker*, 2 Pick. 558; 3 Chit. C. L. 733; 1 do. 191; 4 Black. Com. 303; *Commonwealth v. Costley*, 118 Mass. 16, 26.

other State or on the high seas, but the death occurs within the State.<sup>1</sup>

If one kills another in a duel, it is murder, by statute in Massachusetts [Michigan, New York, Illinois and Iowa]. If the challenge be given in the State, but the place of the duel and the giving of the wound be within another jurisdiction, it is made punishable as murder within the State, if the death takes place there.<sup>2</sup> And [in Massachusetts and Michigan] the second in such a duel is made liable as accessory before the fact to the crime of murder.<sup>3</sup>

No statute of limitations bars an indictment for murder in Massachusetts.<sup>4</sup> [The same rule applies in New York, Michigan, Illinois, Iowa, and probably in other States.]<sup>5</sup>

It was formerly held that if the killing be proved, it was so far a presumption of malice in the party

<sup>1</sup> Mass. Gen. Stat. c. 171, § 18, 19; Comp. Laws Mich. 1874, § 7909. See Rev. Stat. Ill. 1874, 407, § 398; Code of Iowa, 1873, 643, § 4159; Tiff. Cr. L. 352; Moore, C. L. §§ 347, 348, 759-761.

<sup>2</sup> 4 Cooley's Black. 198, note; 3 Chitty, C. L. 728; Mass. Gen. Stat. c. 160, § 9; Rev. Stat. Ill. 1874, 361, § 68; 2 Comp. Laws, Mich. 1871, § 7513; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 1, § 6; Code Iowa, 1873, § 4158.

<sup>3</sup> Mass. Gen. Stat. c. 160, § 10; 2 Comp. Laws, Mich. 1871, § 7514.

[In Illinois and New York, the second also is deemed guilty of murder. Rev. Stat. 1874, 361, § 68. See, also, Code of Iowa, 1873, § 4158, Rev. Stat. of N. Y. pt. 4, ch. 1, tit. 1, § 6.]

<sup>4</sup> Gen. Stat. c. 171, § 20.

<sup>5</sup> Rev. Stat. N. Y. pt. 4, ch. 2, tit. 4, § 37; 2 Comp. Laws, Mich. 1871, § 7896; Code of Iowa, 1873, § 4165; Rev. Stat. Ill. 1874, 398, § 313; 1 Whart. C. L. § 436, *et seq.*]

committing it, as to throw the burden of excuse or justification on the defendant. But such is not held to be the law now; the burden of showing malice is on the government, and if it is left doubtful, the doubt is to avail the defendant. But in speaking of what would be satisfactory evidence of malice, it is said in *Commonwealth v. Webster*, "where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice." In a subsequent case of *Commonwealth v. McKie*, it is said, "it is conceded that the burden is not shifted by proof of a voluntary killing, where there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide." And in another case the chief justice instructed the jury that "if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt, that it was done with malice, they will return a verdict of murder, otherwise they will find the defendant guilty of manslaughter."<sup>1</sup>

<sup>1</sup>*Commonwealth v. York*, 9 Met. 91; *Commonwealth v. Webster*, 5 Cush. 305; *Commonwealth v. McKie*, 1 Gray, 65; *Commonwealth v. Hawkins*, 3 Gray, 466; *State v. Patterson*, 45 Verm. 308, 314.

[The Revised Statutes of Illinois (Rev. Stat. 1845, 155, § 27; id. 1874, p. 374, § 140,) lay down the rule that "malice shall be implied where no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart;" and (Rev. Stat. 1845, 157, § 40; id. 1874, 376, § 155), that "the killing being proved, the burden of

*Manslaughter* is distinguished from murder by being done without malice, either express or implied, as where the homicide is voluntary but upon a sudden heat, or involuntarily but in the commission of some unlawful act.<sup>1</sup> One of the cases given of involuntary homicide being held manslaughter, is carelessly driving over a child in the street, and causing its death.<sup>2</sup>

Every killing in hot blood is not within the category of manslaughter. Such would be a case (where the killing would not be reduced to manslaughter), if caused merely by words of slighting, disdain or contumely.<sup>3</sup> But if one commits an assault upon the other, accompanied with circumstances of indignity, like pulling his nose, and this is immediately followed by a blow causing death, it would

proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide." In *Murphy v. The People*, 37 Ill. 448, the rule is laid down that proof that the prisoner inflicted the mortal wound, raises, in the absence of justifying or mitigating circumstances, a presumption of malice, and devolves on the prisoner the burden of proof of matter in justification or mitigation. In *Peri v. The People*, 65 Ill. 18, the rule is stated to be, that in the absence of apparent well-founded danger of great bodily harm, or such provocation as is calculated to excite irresistible passion, the law will imply malice. See, also, Moore, C. L. §§ 334, 335, and cases cited; Tiff. C. L. 815; 1 Whart. C. L. §§ 709-712.]

<sup>1</sup> 4 Black. Com. 191; East, P. C. 232; 1 Hale, P. C. 466, 472; Rev. Stat. Ill. 1874, § 143; Moore, Cr. L. § 369.

<sup>2</sup> 1 Hale, P. C. 476.

<sup>3</sup> 1 Hale, P. C. 456; 2 Whart. C. L. § 970; East, P. C. 233.



be only manslaughter. But this would not be so held, if the death be caused by the use of a deadly weapon, or by brutal violence.<sup>1</sup>

To reduce a homicide from murder to manslaughter in the cases supposed, the act must follow so soon after the insult offered as not to leave time for the blood to cool. If done for purposes of punishment or revenge, it would be murder, though originally excited by insult.<sup>2</sup>

If, as has been before stated, one kill an officer who is executing a legal process in a lawful manner, it will be murder. But if it be not a legal process, or be executed out of his jurisdiction, it will be no more than manslaughter. So, if he undertake to arrest another without disclosing his being an officer, and the other resists, and in so doing kills the officer.<sup>3</sup>

While homicide committed under the circumstances above described may be either murder or manslaughter, it may be committed so as not to be criminal in its nature, as when it is excusable or justifiable.

If one violently assaults another so that the latter cannot save his life, if he "gives back," and he kills his assailant, he is excused for so doing. But ordinarily the party assaulted must, before he takes the assailant's life, have retreated to the wall or "fly as far as he may to avoid the violence of the assault,

<sup>1</sup> East, P. C. 233-235, 252; 2 Whart. C. L. § 971.

<sup>2</sup> East, P. C. 251, 252; 2 Whart. C. L. § 984.

<sup>3</sup> 1 Hale's P. C. 458; East, P. C. 237; *Rafferty v. People*, 69 Ill. 111; s. c. 72 id. 37; 3 Greenl. Ev. § 123.

before he turns upon his assailant.”<sup>1</sup> The language of Foster on this point is: “The other circumstance necessary to be proved in a plea of self-defense is, that the fact was done from mere necessity and to avoid immediate death.”<sup>2</sup> In the trial of Selfridge in Boston in 1806, Parker, J., instructed the jury as follows: 1. “A man who in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill his assailant, provided he uses all the means in his power, otherwise, to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. 2. When the attack upon him is so sudden, fierce and violent that a retreat would not diminish but increase his danger, he may instantly kill his adversary without retreating at all. 3. When from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterward appear that no felony was intended.”<sup>3</sup>

<sup>1</sup> Hale, P. C. 481, 482; Foster, C. L. 273; 3 Greenl. Ev. § 116; 4 Black. Com. 184, and note; 2 Whart. C. L. §§ 1020, 1026, in which Selfridge's trial is discussed and the point of defense in that case considered. [The subject is regulated by statute in Illinois. Rev. Stat. 1874, 375, § 149; Moore, C. L. § 349, *et seq.*]

<sup>2</sup> Foster, C. L. 278.

<sup>3</sup> Selfridge Trial Report, 100.

[If the defendant was assaulted by the one slain, in such a

But the principle does not extend to cases of attempting to commit a felony upon another, which is not accompanied with force, as attempting to pick one's pocket.<sup>1</sup>

But it extends to the protecting of each other by parent and child, husband and wife, and master and servant, by killing the assailant, in the same way as if the attack were made upon the party himself.<sup>2</sup>

It would not justify or excuse one in taking the life of another to prevent a trespass upon his land, such as taking fruit growing thereon and the like. One may justify the beating of another in defense of his property, but not in taking his life.<sup>3</sup>

If a woman in resisting an attempt to ravish her, kills the man who makes the attempt, it is a justifiable homicide. So, if the one who kills him be husband or father of the woman.<sup>4</sup>

The rule as to the right of one to take life in

way as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life, or suffering great bodily harm, he was, when acting under such apprehension, justified in defending himself, whether the danger was real or only apparent. Actual and positive danger is not indispensable to justify self defense. *Roach v. The People*, 77 Ill. 25, and cases there cited; *Pond v. The People*, 8 Mich. 150; *Hurd v. The People*, 25 Mich. 405.]

<sup>1</sup> 1 Hale, P. C. 488; East, P. C. 273.

<sup>2</sup> 2 Whart. C. L. § 1024; 1 Hale, P. C. 484; *Pond v. The People*, 8 Mich. 150. See, also, *Patten v. The People*, 18 id. 314.

<sup>3</sup> 2 Whart. C. L. § 1025; 1 Hale, P. C. 485, 486; *State v. Patterson*, 45 Verm. 320; *State v. Vance*, 17 Iowa. 138.

<sup>4</sup> 1 Hale, P. C. 485; Foster, C. L. 274.

defense of his person, habitation, or property, is stated by East to be that a man may repel force by force, against one who "manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense."<sup>1</sup> The court of Vermont examined, at considerable length, under what circumstances a man may kill another in defense of his house or his estate. "No assault, however violent, will justify killing the assailant under a plea of necessity, unless there be a manifestation of a felonious intent. If it were to be assumed that the defense might legitimately claim that there was an assault on the house with the intent either of taking the life of the respondent or doing him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary, in order to prevent the perpetration of such crime, or if, under the existing circumstances attending the emergency, the respondent had reason to believe, and was warranted in believing, and in fact did believe, that it was necessary in order to prevent the commission of such a crime. In case the purpose of the assailant was to take life or inflict great bodily harm, and the object of his attack upon the house was to get access to the inmates occupying the same for such

<sup>1</sup> East, P. C. 271 272; Foster, C. L. 273; 1Hale, P. C. 493. See Rev. Stat. Ill. 1874, 375, § 148.

purpose, the same means might lawfully be used to prevent him from breaking in as might be used to prevent him from making the principal assault upon the person in case the parties met face to face in any other place. In either case the point of justification is, that such use of fatal means was *necessary* in order to the rightful, effectual protection of the respondent or his family from the threatened or impending peril.”<sup>1</sup>

NUISANCE, as a public offense, is defined to be the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires.<sup>2</sup> If the annoyance is to a single individual, though he may have a civil action for the damages thereby occasioned, it would not be an indictable act. It must be a common or public nuisance.<sup>3</sup>

Under this head are included obstructions to highways, bridges, and public rivers, or a failure to repair a highway, where the law imposes it as a duty.<sup>4</sup> So, the doing, causing, occasioning, promoting, maintaining, or continuing what is noisome and offen-

<sup>1</sup> *State v. Patterson*, 45 Verm. 308-24. See, also, *Pond v. The People*, 8 Mich. 150; Rev. Stat. Ill. 1874, 375, § 148; *Brown v. The People*, 39 Ill. 407; *Greschia v. The People*, 53 Ill. 295.

<sup>2</sup> 4 Black Com. 167; 3 Greenl. Ev. § 184; Wood on Nuisances, p. 25, § 17; *Earp v. Lee*, 71 Ill. 194.

<sup>3</sup> *Ib.*; *Commonwealth v. Smith*, 6 Cush. 81; *Earp v. Lee*, *sup.*

<sup>4</sup> 4 Cooley's Black. 167, note; 3 Greenl. Ev. § 185; *Commonwealth v. Old Colony R. R.* 4 Gray, 93. See Rev. Stat. Ill. 1874, 385, § 221, for an enumeration of public nuisances in Illinois.

sive, or annoying, or vexatious, or plainly hurtful to the public, or is a public outrage against common decency or common morality, or tends plainly and directly to the corruption of the morals, honesty and good habits of the people, the same being done without authority or justification by law.<sup>1</sup> Among the cases given as examples in the books, are offensive trades in settled neighborhoods, carrying a person infected with a contagious disease through a frequented street, making or keeping gunpowder in or near a frequented place, making great noises in the street at night, keeping a disorderly house, or house of ill fame, and being a common scold.<sup>2</sup> These and other like acts are common law offenses, nor is the common law superseded by their being made statute offenses.<sup>3</sup>

No length of time will legitimatize a public nuisance, nor will any one be authorized to continue what creates a nuisance to a neighborhood, although the neighborhood has grown up since the cause of the nuisance was first established, at which time it was not a nuisance.<sup>4</sup>

There is a statute in Massachusetts declaring

<sup>1</sup> 3 Greenl. Ev. § 184, from the report of Massachusetts Commissioners on Criminal Law.

<sup>2</sup> See 2 Whart. C. L. § 2391, and cases there cited; Wood on Nuisances, p. 52, § 57.

<sup>3</sup> Greenl. Ev. § 184; 4 Cooley's Black. 168; Commonwealth v. Rumford Chem. Works, 16 Gray, 231; Commonwealth v. Kimball, 7 Gray, 328; Wood on Nuisances, 33, *et seq.*

<sup>4</sup> Commonwealth v. Upton, 6 Gray, 473; 2 Whart. C. L. § 2367; Wood on Nuisances, p. 27, §§ 18, 19; *id.* p. 83, § 80; 3 Greenl. Ev. § 187, note of cases.

many things nuisances which are such at the common law, giving the Mayor and Aldermen of a city, or Selectmen of towns, authority to abate them, and imposing fines or imprisonment for keeping or maintaining a common nuisance.<sup>1</sup> [In Massachusetts, Illinois, and several of the other States, buildings used for the illegal keeping or sale of intoxicating liquors are by statute declared to be common nuisances.<sup>2</sup>]

It is stated that if a dog becomes ferocious and dangerous to the public, he is therefore a public nuisance, and any one may kill him.<sup>3</sup>

And, as a general proposition, any one may abate a public nuisance, provided, in so doing, he do not commit a breach of the peace.<sup>4</sup>

<sup>1</sup> Gen. Stat. c. 87. See Rev. Stat. Ill. 1874, 385, §221 ; Code of Iowa, 1873, § 4089.

<sup>2</sup> Mass. Gen. Stat. c. 87, § 6; Rev. Stat. Ill. 1874, 439, § 7; *Streeter v. The People*, 69 Ill. 595; Code Iowa, 1873, § 1543.

<sup>3</sup> 1 Bish. C. L. (4th ed.) § 1034, and note.

<sup>4</sup> 1 Bish. C. L. (4th ed.) § 1035 ; 2 Whart. C. L. § 2377.

[See, however, Wood on Nuisances, p. 747, § 729, *et seq.*, where, after an elaborate review of the authorities, the rule is laid down, that a private person may not, under any circumstances, of his own motion, abate a strictly public nuisance, (that is, one that affects public rights merely, and does not damage one individual member of the community more than another ; principal among which are nuisances merely affecting the morals of the community, and arising from the improper, immoral, indecent and unlawful acts of a person), and that the offense is one that can only be reached by indictment or by proceedings in equity at the suit of the people by its proper officers ; but that any person who sustains a special injury or damage from a public nuisance to an extent that will support an action at law, may abate the same of his own motion, doing no more damage

PERJURY is not only an offense declared to be such by statute, but is one at common law, and indictable as such in cases not covered and provided for by statute. It is defined by the Massachusetts statute in almost the same words as writers upon criminal law have described it at the common law. "Whoever, being required by law to take an oath or affirmation, willfully swears or affirms falsely in regard to any matter or thing respecting which such oath or affirmation is required, shall be deemed guilty of perjury." Mr. Deacon describes it as "the crime of willful, false swearing to any matter of fact material to the issue or point in question, when a lawful oath is administered in some judicial proceeding."<sup>1</sup>

To bring the act of false swearing within the category of perjury at common law, the oath must be taken before some court of justice having power to administer it, or before some magistrate or proper officer invested with a similar authority, in some proceeding relative to a civil suit or criminal prosecution. And it is essential to the crime that the officer administering the oath should have authority to administer it, and that it should be administered

than is necessary to protect his rights and prevent a recurrence of damage from the nuisance abated. See also *Earp v. Lee*, 71 Ill. 193; 2 Whart. C. L. § 2377.]

<sup>1</sup> 3 Greenl. Ev. § 188; Gen. Stat. Mass. c. 163, § 2; Deac. C. L. 998; Hawk. P. C. c. 69, § 1; 4 Cooley's Black. 136, and note; Rev. Stat. N. Y. pt. 4, ch. 1, tit. 4, § 1; Code of Iowa, 1873, § 3936; 2 Comp. Laws Mich. 1871, § 7654; Rev. Stat. Ill. 1874, 387, § 225.



in a course of justice. This does not include an oath of office.<sup>1</sup>

Coke defines an "oath" as being an "affirmation," and both terms are used in the Massachusetts statute. But it is apprehended that this was done to cover the cases where the party declines to adopt the common law form of an oath in testifying and chooses to "affirm" the truth of what he testifies.<sup>2</sup>

The oath must be administered by some officer or tribunal in the hearing of a matter over which he or it has jurisdiction and is acting. This excludes extra-judicial oaths, and oaths administered by judges or officers acting out of their jurisdiction.<sup>3</sup> Thus, where commissioners in bankruptcy having adjudicated A to be a bankrupt, examined B upon oath as to his assets, and B was indicted for perjury in such examination, and it turned out that the debts due from A were not sufficient to subject him to the bankruptcy process, it was held not to be perjury, inasmuch as the commissioners had no jurisdiction of the case.<sup>4</sup>

It is sufficient that the form of the oath taken is by a mode usually practiced.<sup>5</sup>

<sup>1</sup>4 Cooley's Black. 137, and note; 2 Bish. C. L. (4th ed.) § 990; *Morrell v. The People*, 32 Ill. 499; *VanDusen v. The People*, 78 Ill. 645; Moore, C. L. § 692; Tiff. C. L. 849.

<sup>2</sup>3d Inst. 164; Gen. Stat. c. 131, §§ 10, 11,

[Both terms are also also used in the statutes of Iowa, Illinois and New York, above cited.]

<sup>3</sup>2 Bish. C. L. (4th ed.) § 984, 991, 992; 3d Inst. 165; 2 Chit. C. L. (Perkins' ed.) 303, note. See, also, *VanDusen v. The People*, 78 Ill. 645; Tiff. C. L. 849.

<sup>4</sup>*Reg. v. Ewington*, 1 Car. & Marsh. 319.

<sup>5</sup>3 Greenl. Ev. § 192; 2 Chit. C. L. 309.

Another element in the crime of perjury is that the false testimony given should be material to the issue or question in controversy. It is often difficult to discriminate between what is, and what is not material. But the degree of materiality is of no importance; for, if it tends to prove the matter in hand, it is enough, though it be but circumstantial, or form a link in a chain of testimony.<sup>1</sup> Thus, to swear to the character of a witness is material. But it is not necessary to constitute perjury that the testimony should be believed, or obtain any credit.<sup>2</sup>

It is not enough that the testimony given should be false to constitute perjury, but it must be corruptly and willfully so; for a man may honestly state as true what is in fact false. And an oath is willful when taken with deliberation, and not through surprise, or inadvertency, or mistake of the true state of the question.<sup>3</sup>

A man may commit perjury in testifying to what is true, if he does not know the facts of which he testifies, and corruptly states that to be true which

<sup>1</sup>3d Inst. 166; 3 Greenl. Ev. § 195; 2 Chit. C. L. 305; Commonwealth *v.* Pollard, 12 Met. 230; Wood *v.* The People, 59 N. Y. 117; Pollard *v.* The People, 69 Ill. 148; Morrell *v.* The People, 32 Ill. 499; 2 Bish. C. L. (4th ed.) § 954; Moore, C. L. § 696; Tiff. C. L. 850.

<sup>2</sup>2 Chit. C. L. 306; 3 Greenl. Ev. § 196; 4 Cooley's Black 137, note; Hoch *v.* The People, 3 Mich. 557; Pollard *v.* The People, 69 Ill. 148.

<sup>3</sup>2 Bish. C. L. (4th ed.) § 1007; Moore C. L. § 701; Tiff. C. L. 851; 3 Whart. C. L. §§ 2199, 2200; Pollard *v.* The People, 69 Ill. 148; Commonwealth *v.* Douglass, 5 Met. 244. See 1 Bish. C. L. § 421, for definition of "willful."

he believes to be otherwise, or does not know whether it is true or not.<sup>1</sup> As where a witness testified to being present when a certain contract was made between A and B, the making of which was the point at issue, and described the place at which it was made, but he in fact knew nothing of the matter, it was held to be perjury, although, in fact, the contract was made.<sup>2</sup>

In order to convict a witness of perjury, he must state that of which he testifies, positively and absolutely, and not by the way of supposition or belief; and where he stated it to be to the best of his opinion, it would not sustain a charge of perjury. And it is in this way it is generally impossible to convict one of perjury who testifies as an expert, as such testimony is ordinarily given in the form of opinion or belief. But it is not a subterfuge which saves him, if in fact he do not believe what he testifies that he believes. In such case the question is not whether the thing is true, but whether, when he said he believed it to be true, he did not so believe. If such be the case, it would be perjury, notwithstanding the form under which the falsehood was sought to be covered.<sup>3</sup>

<sup>1</sup> *King v. Mawbey*, 6 Term. 637, by Lawrence, J.; *Commonwealth v. Halstat*, 2 Law Rep. 179; 3 Whart. C. L. § 2001; 2 Chit. C. L. 203; 3 Inst. 166; 3 Russ. C. (Greave's Ed.) 2; 3 Greenl. Ev. § 200.

<sup>2</sup> *People v. McKinney*, 3 Park. C. R. 510.

<sup>3</sup> *Commonwealth v. Brady*, 5 Gray, 78; 2 Chitty. C. L. (Perk. ed.) 305, note; 3 Whart. C. L. § 2201; 3 Russ. C. (Greave's ed.) 2; 2 Bish. C. L. (4th ed.) 1001; 3 Greenl. Ev. § 200; 4 Cooley's Black. 137, note.

*Subornation of Perjury* is the instigation or procuring or persuading another to commit perjury, and is punishable at common law, as well as by statute. Nor is it necessary, in order to constitute the crime of subornation, that the party instigated should actually take a false oath.<sup>1</sup> Nor would it be subornation of perjury to call a witness who it is known will swear falsely, if the one calling him has done nothing to induce him to do so. So, if he call the witness to testify to what is not true, believing the witness will so testify, it will not sustain the charge of subornation, unless he knew the witness would willfully testify to a fact which he knew to be false, because the witness might testify to what was not true under a mistake.<sup>2</sup>

It requires more evidence than the testimony of a single witness to convict one of the charge of perjury, but one is sufficient upon a trial for subor-

[<sup>1</sup> In *1 Hawkins' Pleas of the Crown* (8th Lond. ed. by Curwood), on page 435, it is said that "subornation of perjury, by the common law, seems to be an offense in procuring a man to take a false oath amounting to perjury, who actually takes such oath." He also states that it seems clear "that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished," etc. See, also, 2 Whart. C. L. §§ 2285, 2287; Gen. Stat. Mass. ch. 163, § 4; Rev. Stat. Ill. 1874, 387, § 228; 2 Comp. Laws Mich. 1871, § 7656; Rev. Stat. N. Y. pt. 4, c. 1, tit. 4, § 8; Code of Iowa, 1873, § 3938.]

<sup>2</sup> 3 Greenl. Ev. § 188; 2 Whart. C. L. § 2284; Commonwealth v. Douglass, 5 Met. 244, 245. Subornation of perjury is put upon the same ground as perjury in the matter of punishment in Massachusetts. Gen. St. c. 163, § 3.

nation of perjury.<sup>1</sup> [As to perjury, the rule is now stated to be that the adverse testimony of one witness with corroborating circumstances sufficient to destroy the equilibrium and overcome the presumption of innocence, will suffice to warrant a conviction.<sup>2</sup> But it is only to prove the falsity of the matter testified, that more evidence than that of a single witness is required; the testimony of one witness alone is sufficient to prove all the other allegations of the indictment.]<sup>3</sup>

RIOTS, ROUTS, UNLAWFUL ASSEMBLIES. These are modifications of the offense of numbers assembling together under circumstances to create terror and disturbance in the people, depending upon the numbers engaged, the purposes of coming together and the extent to which such purposes are carried in accomplishing them.

So long as people come together in an orderly and peaceable manner to consult upon the public good, they are only exercising a right secured to them by the Bill of Rights.<sup>4</sup> It is only when the assembling together is done in such a manner as strikes terror, or tends to strike terror in others, that it becomes unlawful. Three are sufficient in number to constitute a riot or a rout; and, whether

<sup>1</sup> *Commonwealth v. Douglass, sup.*

<sup>2</sup> *Crandall v. Dawson*, 1 Gilm. 559; 2 Whart. C. L. § 2276a; Moore, C L. § 699.

<sup>3</sup> Moore, Cr. L. § 700; 3 Greenl. Ev. § 198; *Commonwealth v. Pollard*, 12 Met. 225.

<sup>4</sup> Mass. Const. pt. 1, § 19; Const. Ill. Art. 2, § 17. See, also, Cooley's Const. Lim. 349.

it is the one or the other, depends upon doing the act in whole or in part for which they come together, or the mere advance made toward it without actually doing any act. The first would be a riot, the other a rout. If they merely come together, and then part without doing the act, or making any motion towards it, it is an unlawful assembly. But the number mentioned in the statutes of Massachusetts, [Michigan and Illinois] as constituting an unlawful assembly to be dispersed by civil officers, if armed with clubs or dangerous weapons, is twelve; if unarmed, thirty or more, provided they are unlawfully, riotously or tumultuously assembled, though three might be an unlawful assembly at common law.<sup>1</sup>

A *riot* is defined to be a tumultuous disturbance of the peace by three persons or more assembling together, of their own authority, with an intent mutually to assist one another against any one who shall oppose them, and afterward putting their design into execution in a terrific and violent manner, whether the object in question be lawful or otherwise.<sup>2</sup>

The distinction between a riot, rout and unlaw-

<sup>1</sup> Gen. Stat. Mass. c. 164, § 1; 2 Comp. Laws, Mich. 1871, § 7681; Rev. Stat. Ill. 1874, 390, § 253; Commonwealth v. Runnels, 10 Mass. 520; 3 Inst. 176; 2 Chit. C. L. 486. The English riot act mentions twelve persons.

<sup>2</sup> Hawk. P. C. (8 Lond. ed.) p. 513, b. I. c. 28, § 1; 2 Chitty, C. L. 490, note.

[By the statute of Illinois two persons only are requisite. Rev. Stat. 1874, 390, § 249. See Dougherty v. The People, 4 Scam. 179; Bell v. Mallory, 61 Ill. 167.]

ful assembly seems to be as above stated; in the first there is actual violence; in the second there is an endeavor to commit it; in the third there is neither violence committed, nor an endeavor made toward it.<sup>1</sup> If they come together for a lawful purpose, and, after assembling they form themselves into parties, with promises of mutual assistance, and actually make an affray, the assembly becomes a riot; or, if after coming together, the assembly confederate to do an unlawful act, and do any act of violence in a tumultuous manner, it would be a riot.<sup>2</sup>

A distinction is to be made between riots which relate to objects of a private nature, and a resistance to government, which partakes of the character of treason or insurrection.<sup>3</sup>

If the evidence fails to show that three persons were engaged in what is charged as a riot, the prosecution fails, since less than that number cannot commit the crime.<sup>4</sup> But it would be sufficient, if one is indicted for a riot with three or more persons unknown; and if a riot consisting of more than three is proved, and that the accused took part in it, the jury may convict the defendant.<sup>5</sup>

<sup>1</sup> 2 Chitty, C. L. 490, note; Hawk. P. C. *sup.* § 1, 8, 9.

<sup>2</sup> 3 Greenl. Ev. § 218.

<sup>3</sup> 3 Greenl. Ev. § 220.

<sup>4</sup> 3 Greenl. Ev. § 217; Hawk. P. C. b. 2 c. 47, § 8; 2 Whart. C. L. § 2483.

<sup>5</sup> 2 Chit. C. L. 490, note; 1 Whart. C. L. § 431; 3 *id.* § 2483.

[It would seem to be sufficient if one was indicted for a riot with *two* or more persons unknown, since only three persons are necessary to constitute the offense. See the authorities above cited and 2 Bish. Cr. Proc. § 998.]

It is not necessary that the thing intended to be accomplished, should be unlawful in itself, if the manner of doing it be turbulent or calculated to excite terror.<sup>1</sup>

If one joins in a riot after it has begun, he will be liable in the same way as if he had instigated it.<sup>2</sup>

There are statute provisions in England and this country for suppressing riots and dispersing unlawful assemblies.<sup>3</sup>

ROBBERY, by the common law, is larceny from the person, accompanied by violence or putting in fear. There must be something taken.<sup>4</sup>

To constitute a taking, the property must have passed into the possession of the offender. Snatching an ear ring from a lady's ear so that the ear is torn in the operation is robbery, though it is dropped into the hair and is found there by the owner.<sup>5</sup> But cutting a bag fastened to a person's girdle, which falls upon the ground, but is not actually taken hold of by the assailant, is not a taking which sustains the charge of robbery.<sup>6</sup> If one who

<sup>1</sup> 2 Bish. C. L. (4th ed.) § 1101; 2 Whart. C. L. § 2478; 2 Chit. C. L. (Perkins' ed.) 490, note; Rev. Stat. Ill. 1874, 390, § 249.

<sup>2</sup> 2 Whart. C. L. § 2480.

<sup>3</sup> See Gen. Stat. Mass. c. 164, §§ 1, *et seq.*; 2 Comp. Laws Mich. 1871, § 7681; Rev. Stat. Ill. 1874, 390, § 253.

<sup>4</sup> *Commonwealth v. Clifford*, 8 Cush. 215; East, P. C. 783; 3 Chitty, C. L. 800; Rev. Stat. Ill. 1884, 390, § 246.

<sup>5</sup> 3 Chit. C. L. 802; 3 Greenl. Ev. § 225; Moore, C. L. § 545; *Commonwealth v. Clifford*, *sup.*

<sup>6</sup> 3 Inst. 69; 3 Greenl. Ev. § 225; 1 Hale, P. C. 533; Moore, C. L. § 545.



is the owner of an article which another has unlawfully taken from him, re-takes it by force, it is not robbery.<sup>1</sup>

Stealing from the person, such as picking one's pocket, is not robbery, unless done with violence or putting in fear. So, snatching an article from the hands of the owner suddenly is not robbery, unless it is attached to his person or clothes, as a watch from the pocket, which was secured by a chain around the owner's neck, which the thief broke in taking it.<sup>2</sup>

Taking articles from the presence of the owner by violence, or putting in fear, is robbery, though they are articles which cannot be attached to his person, such as cattle, horses and the like, or from a desk which the owner is induced to open through fear or by violence.<sup>3</sup> It does not seem to be necessary to show that the one robbed was put in fear, if actual violence were shown to have been applied in the taking.<sup>4</sup>

The statute of Massachusetts makes a marked distinction in the degree of punishment, between robberies committed by those armed with dangerous weapons, and those not thus armed.<sup>5</sup> In the first

<sup>1</sup> *Rex v. Hall*, 3 C. & P. 409; *Commonwealth v. Clifford*, 8 Cush. 215.

<sup>2</sup> 3 Greenl. Ev. § 239; 3 Chit. C. L. 804-805; East, C. L. 701, 702.

<sup>3</sup> 2 Bish. C. L. (4th ed.) § 1117, note; East, P. C. 707; Moore, C. L. § 550.

<sup>4</sup> Foster, C. L. 128, 129. See Moore, C. L. § 549; Tiff. C. L. 907.

<sup>5</sup> [Gen. Stat. Mass. c. 160, § 22-25. So, in Illinois, Michigan

case, putting in fear is not declared to be a part of the offense; in the second it is.<sup>1</sup>

**TREASON.** Although this is described by Blackstone as "the highest civil crime which any man can possibly commit," from its being a political offense, and since, if carried out into a successful revolution, it may lose its criminality and become a matter of commendation and praise, it lacks the instinctive odium and aversion in the public estimation with which many crimes of less magnitude are regarded. It is defined by the Constitution of the United States to "consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."<sup>2</sup>

The statute of Massachusetts makes use of the same language, except in describing it as treason against this Commonwealth, and the same is true of the other States.<sup>3</sup>

As this is an offense against the sovereign power in a State, a question was made and gravely controverted, whether there could be treason against a State, as distinguished from the United States. But the point seems to be settled that there may be, upon the ground that there are two sovereignties within

and Iowa. Rev. Stat. Ill. 390, § 246; 2 Comp. Laws, Mich. 1871, § 7524, 7526; Code Iowa, 1873, § 3858-3860.]

<sup>1</sup> Gen. Stat. Mass. c. 160, § 22-25. See, also, 2 Comp. Laws, Mich. 1871, §§ 7524, 7526.

<sup>2</sup> Art. 3, § 3, cl. 1.

<sup>3</sup> Gen. Stat. Mass. c. 159, § 1; Rev. Stat. Ill. 1874, 392, § 264; Const. Mich. Art. 6, § 30; Code, Iowa, 1873, § 3845; Rev. Stat. N. Y. pt. 4, c. 1, tit. 1, § 1; 3 Greenl. Ev. § 237.

the same territory, to both of which the citizen owes allegiance, and for a treasonable violation of either he would be liable in the courts of each respectively. The distinction is laid down by Durfee, C. J., in the case of *Dorr*: "If the blow be aimed at the internal and municipal regulations or institutions of the State, without any design to disturb it in the discharge of any of its functions under the Constitution of the United States, it is treason against the State only." But, if upon the application of a State to the Government of the United States to protect it against invasion or domestic violence, a party should make war upon the forces sent by the United States for this purpose, what was at first treason against the State may grow into a crime against the United States.<sup>1</sup>

But a State court can take no cognizance of an act of treason against the United States, though done within the limits of such State.<sup>2</sup>

The definition given by the Constitution and statutes above referred to excludes what is called petit treason in England and sundry other acts which are made treason there by statute. An insurrection or rising of any body of people within the United States to attain or effect by force or violence any object of a great public nature, or of a public concern, is a levying war against the United States. Such would be a rising to resist the execution

<sup>1</sup> *Moore v. State of Illinois*, 14 How. 20; 3 Whart. C. L. §§ 2774, 2769; *People v. Lynch*, 11 John. 552, 553; 4 Cooley's Black. 84, note.

<sup>2</sup> *People v. Lynch*, *sup.*

of a statute of the United States. Military weapons are not necessary to the levying of war; numbers and other instruments may be sufficient. But if the assembling be for a private purpose, though the people be armed, it would not be treason, although it might constitute a riot.<sup>1</sup>

Adhering to the enemy, within the meaning of the Constitution, may be the doing of any overt act done with that intent, and tending to that end, such as furnishing him with provisions, intelligence, or munitions of war, or the like.<sup>2</sup>

In order to establish the proof of treason, both the statutes of England and this country require at least two witnesses of some overt act, and the Constitution of the United States and the laws of some of the States require two witnesses to the same act, and it is not sufficient to have one witness to one act and a second to another.<sup>3</sup>

There are no accessories to treason; all who partake in it are principals.<sup>4</sup>

As to the persons who may be guilty of treason

<sup>1</sup> 4 Cooley's Black. 81, 83, 84, note; 3 Greenl. Ev. § 242, and note, opinion of Curtis, J.

<sup>2</sup> 3 Greenl. Ev. § 244; 2 Whart. C. L. § 2732; 2 Bish. C. L. (4th ed.) § 1207.

<sup>3</sup> 3 Greenl. Ev. § 246; Mass. Gen. Stat. c. 159, § 4.

[In Michigan and Iowa no person can be convicted of treason "unless upon the testimony of two witnesses to the same overt act, or on confession in open court." Const. Mich. Art. 6, § 30; Code, Iowa, 1873, § 3847. In Illinois the statute provides that "any person being thereof duly convicted of open deed, by two or more witnesses, or voluntary confession in open court, shall suffer," &c. Rev. Stat. 392, § 264.]

<sup>4</sup> 3 Greenl. Ev. § 245; 1 Hale, P. C. 233, 234, 237, 613.

in this country, it includes aliens and citizens. If aliens reside here and enjoy the protection of our laws, they may commit treason by co-operating either with rebels or foreign enemies.<sup>1</sup>

**ACCESSORIES.** As has been before remarked, to the commission of some crimes there may be accessories, while all who take part in the commission of others are regarded as principals, whether they are present at the commission or not. The distinction between principals and accessories is this: To be a principal one must be present at the commission of the act, aiding and abetting in the perpetration of it; that is, assenting to it. It would be a being present, if the person, by agreement with the chief perpetrator, is in a situation in which he might render assistance in some manner to the commission of the offense.<sup>2</sup>

Accessories may be such before or after the fact. The first is where being absent at the time of the felony committed, one procures, counsels or commands another to commit a felony. This he may do through a third person. The accessory must instigate and incite the principal to the act.<sup>3</sup>

Accessories after the fact are such as knowing a felony to have been committed by another, relieve or assist the felon, or voluntarily and inten-

<sup>1</sup> 2 Bish. C. L. (4th ed.) § 1208.

<sup>2</sup> 3 Greenl. Ev. § 40; *Commonwealth v. Knapp*, 9 Pick. 518, where the party was 300 feet distant from the place of the act of murder done, and was held to be present.

<sup>3</sup> 2 Greenl. Ev. §§ 42, 50.

tionally suffer him to escape, or rescue him, or aid and receive an accessory before the fact.<sup>1</sup>

At common law an accessory cannot be tried and convicted until the principal has been convicted. But in many of the States accessories may be tried and convicted whether the principal has been convicted or not.<sup>2</sup>

**LIMITATION.** There is no general statute of limitation as to the time within which crimes must be prosecuted, but there are sundry statutes in England in respect to particular offenses. In Massachusetts all offenses, except murder, must be prosecuted within six years after the commission of the offense. As to murder there is no such limitation.<sup>3</sup>

**ATTEMPTS, ETC.** Although an act without a criminal intent does not constitute a crime, nor does a criminal intent, unless followed by some act done, yet, if the intent be followed by an attempt to do a criminal act, like the commission of a felony, which

<sup>1</sup> 3 Greenl. Ev. § 47.

<sup>2</sup> 3 Greenl. Ev. § 46; 2 Bish. C. L. (4th ed.) § 614; Mass. Gen. St. c. 168, §§ 5, 7; [Rev. Stat. Ill. 1874, 393, §275; 2 Comp. Laws Mich. 1871, §§ 7920, 7934; Code Iowa, 1873, § 4315. By statute in Illinois and Michigan all accessories at or before the fact are made principals. Rev. Stat. Ill. 1874, 393, § 274; 2 Comp. Laws Mich. 1871, § 7934. See also *Baxter v. People*, 3 Gilm. 368; *Brennan v. People*, 15 Ill. 311; *Kennedy v. People*, 49 Ill. 488; *Coates v. People*, 72 Ill. 304; *Shannon v. People*, 5 Mich. 71.]

<sup>3</sup> 1 Chit. C. L. 160; Gen. Stat. Mass. c. 171, § 20. See also Rev. Stat. N. Y. pt. 4, c. 2, tit. 4, § 37; 2 Comp. Laws Mich. 1871, § 7896; Code Iowa, 1873, § 4165; Rev. Stat. Ill. 1874, 398, § 313; 1 Whart. C. L. § 436.

is attended by some act towards consummating it, it will be a criminal misdemeanor, though the attempt be not successful. So, the attempt to commit a misdemeanor may in some cases be a misdemeanor.<sup>1</sup>

The Massachusetts statute punishes any one who attempts to commit an offense prohibited by law, "and in such attempt does any act towards the commission of such offense." [There are similar statutes, also, in Illinois, Michigan and New York.]<sup>2</sup> So, the soliciting another to commit what is a crime *per se*, as distinguished from what is a mere statute offense, is itself a misdemeanor.<sup>3</sup>

In some cases the having an article with an intent to commit a crime, is a criminal act, as having lottery tickets with intent to sell, or having counterfeit bills or implements for counterfeiting, and the like.\*

<sup>1</sup> 3 Whart. C. L. § 2696, 2702; 1 Bish. C. L. (4th ed.) § 659.  
1 Russ. C. (Greave's ed.) 46.

<sup>2</sup> Gen. Stat. Mass. c. 168, § 8; Rev. Stat. Ill. 1874, 393 § 273; 2 Comp. Laws, Mich. 1871, § 7813; Rev. Stat. N. Y. pt. 4, c. 1, tit. 7, § 3.

<sup>3</sup> 1 Russ. C. (Greave's ed.) 47, n.; 3 Whart. C. L. § 2697, Commonwealth v. Bowen, 13 Mass. 359; 1 Bish. C. L. (4th ed.) § 689.

\* Commonwealth v. Dana, 2 Met. 340, 342; Gen. Stat. Mass. c. 162, § 8, 17; Rev. Stat. Ill. 1874, 379, § 182; 2 Comp. Laws, Mich. 1871, § 7736.

## CHAPTER III.

## CRIMINAL PROCEDURE.

## I. COMPLAINTS BEFORE EXAMINING MAGISTRATES AND PROCEEDINGS THEREON.

THERE are two modes of originating process against persons suspected or charged with the commission of a criminal act: one by a complaint made before an examining magistrate who is authorized to arrest the person charged, and examine into the truth of the charge for the purpose of inflicting upon him the punishment prescribed by law, if the offense is within the jurisdiction of the magistrate, or of holding him by bail or imprisonment to answer at a higher tribunal; the other by a complaint made directly to the grand jury who are to pass upon it by returning an indictment, if they believe the charge well founded, against the party complained of, upon which a process is issued, by which the one who is indicted is arrested and held to answer to the charge therein contained.

For the present the inquiry will be limited to complaints made before magistrates.

It the first place the magistrates here referred to are such as answer to those who, in England, are known as Justices of the Peace. This is a very ancient office, having been created as early as the



stat. 1 Ed. III. c. 16.<sup>1</sup> In most, if not all, of the States there is an officer or magistrate answering in most, if not all, respects to justices of the peace, having power to receive complaints and issue process in criminal matters. Under the United States laws, these officers are called commissioners.<sup>2</sup>

Under the Colony Charter of Massachusetts the office of justice of the peace was not known for many years; but under the Province Charter and ever since, it has been a well-defined office, though other offices have now been clothed with similar powers, as in case of Police Courts, Trial Justices, and District Courts, under the various statutes creating them.<sup>3</sup> And although the principal part of their jurisdiction in criminal matters has been transferred to these other tribunals, the original term of justice of the peace will be retained in this treatise as representing the magistrate who has cognizance of the primary measures for prosecuting criminal offenses. For the forms or modes

<sup>1</sup> Com. Dig. Justice of the Peace. It is related by Miss Strickland (Queens of England, 5 vol. 278 p.), that Queen Mary made Lady Berkley a justice of the peace for Gloucestershire, and Lady Rous of the quorum for Suffolk, and that she sat with the other justices at assizes "*cincta gladio.*" There will be no occasion for the purposes of this work to discriminate between these two classes of magistrates.

[By stats. 13 Rich. II. st. 1, c. 7. and 2 Hen. V. st. 2, c. 1, it was provided that the justices should be made, within the counties, of the most sufficient knights, esquires and gentlemen of the law. 3 Burr's Justice, 990.]

<sup>2</sup> Stat. 1842, c. 188, § 1.

<sup>3</sup> 6 Dane, Abr. 412; Gen. Stat. c. 120, §§ 32, 36; id. c. 116, § 12; id. c. 169, § 1; Acts of 1869, c. 415.

of proceeding, moreover, reference will ordinarily be made to those in use in Massachusetts, which will be found to correspond in most respects to the requirements of the common law, unless specifically noticed.<sup>1</sup>

For the purposes of arrest, examination and committing or binding over for trial for offenses of every kind, however high or aggravated, justices of the peace may receive complaints and issue warrants, but may not proceed to punish any offense except such as are by statute brought within their jurisdiction.<sup>2</sup>

Without stopping to consider in what cases a magistrate may issue a warrant to arrest a person for crime without a previous formal complaint, both the statute and the common law contemplate a proper and formal complaint as the first step in a criminal proceeding before a magistrate. This complaint is a statement under oath signed by some person competent to make it of the name of the party charged, the place of the commission of the offense, and a full, plain, substantial and formal description of the offense charged, with a reasonable degree of certainty. It should also contain an averment of the time of the alleged commission, though, if it be prior to the filing of the complaint, it will ordinarily be sufficient, unless time enters

<sup>1</sup> Commonwealth *v.* Leach, 1 Mass. 59; Commonwealth *v.* Foster, 1 Mass. 488.

<sup>2</sup> Gen. Stat. Mass. c. 120, § 45; Rev. Stat. Ill. 1874, 401, § 347; 2 Comp. Laws, Mich. 1871, § 7843; Rev. Stat. N. Y. pt. 4, ch. 2, tit. 2, § 1; Code, Iowa, 1873, § 4108.

into the nature of the offense charged.<sup>1</sup> But what are the requisite averments in a criminal complaint will be more fully considered when the subject of indictments is treated of further in the work.

If the name of the party intended to be charged, be unknown, he may be otherwise described so as to identify him.<sup>2</sup> If the person on whom the offense was committed is unknown, it would be sufficient to so aver in the complaint. But if he is known, he must be named or the complaint would be bad.<sup>3</sup>

As to how far it is necessary to a valid complaint that it should positively charge the commission of an offense, the rule seems to be this: If the offense is within the jurisdiction of the magistrate to try and render judgment thereon, it must be directly and positively charged to have been committed by the party named. But if the complaint be for an offense where the magistrate may only examine and commit, or admit to bail for hearing in a higher court, it will be sufficient that the complaint avers that he has probable cause to suspect that the accused has committed the offense.<sup>4</sup>

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 34, and note, 39, 226, 227; Commonwealth v. Phillips, 16 Pick. 214; Commonwealth v. Perkins, 1 Pick. 388; Gen. Stat. Mass. c. 170, § 10; Rev. Stat. Ill. 1874, 401, § 348; Code of Iowa, 1873, § 4185; Commonwealth v. Blood, 4 Gray, 32; 1 Bish. Crim. Proc. § 718, 720; Moore, C. L. § 44; Tiff. C. L. 39.

<sup>2</sup> 1 Chit. C. L. 39; Tiff. C. L. 40; Rev. Stat. Ill. 1874, 401, § 350; Moore, C. L. p. 35, note 6.

<sup>3</sup> Commonwealth v. Blood, 4 Gray, 33; 1 Chit. C. L. 216-217; Tiff. C. L. 41.

<sup>4</sup> Commonwealth v. Phillips, 16 Pick. 214, 215. See Rev.

When the complaint is for the purpose of obtaining a search warrant, it is sufficient to aver the commission of the felony, and that the complainant has cause to suspect, and does suspect, that the property is secreted in the place to be searched.<sup>1</sup>

By the statute of Massachusetts upon a complaint being made to a magistrate, it is for him to "reduce the complaint to writing," after examining upon oath the complainant and any witnesses produced by him, and cause the same to be subscribed by the complainant.<sup>2</sup> But so far as reducing it to writing is concerned, this is undoubtedly directory, and it may be done by the complainant himself, or any third person. And if made upon oath before a magistrate, it then becomes his duty, if he is satisfied that the offense has been committed, to issue a warrant under his hand and seal, reciting the substance of the accusation, requiring the officer to forthwith take the person named, and bring him before the

Stat. Ill. 1874, 401, § 348; Moore, C. L. § 44; *Housh v. The People*, 75 Ill. 487.

<sup>1</sup>*Commonwealth v. Phillips*, 16 Pick. 214. [See Moore, C. L. § 135, *et seq.*; Rev. Stat. Ill. 1874, 404, § 372; Tiff. Cr. Law, 278. The facts and circumstances inducing complainant's belief, should also be stated, and they must be sufficient to show that there is probable cause for such belief. *Cooley's Const. Lim.* § 304; Tiff. C. L. 278; Moore, C. L. p. 100.]

<sup>2</sup>[The statute of Ill. (Rev. Stat. 1874, 401, § 348) also requires the complaint to be sworn to by complainant, as well as subscribed. The statutes of Michigan (2 Comp. Laws, 1871, § 7844) and New York (Rev. Stat. pt. 4, c. 2, tit. 2, § 2,) require the magistrate to "examine on oath the complainant, and witnesses who may be produced by him," but does not require the examination to be taken down in writing. See *People v. Lynch*, 29 Mich. 278.]

justice who issues it, or some other magistrate of the county, to be dealt with according to law.<sup>1</sup>

The warrant usually directs the officer who serves it, to summon the persons named as witnesses to be examined as to the matters charged therein, to appear before the magistrate to whom he returns the same, at the hearing to give evidence on the examination.

The proceedings thus far are to be had in the county in which the offense is committed, with certain exceptions, one of which is, if the act complained of be done near the boundary line between two counties, in England within five hundred yards,<sup>2</sup> in Massachusetts one hundred rods,<sup>3</sup> it may be prosecuted in either.<sup>4</sup> So, if the act of striking or poisoning be done in one county, and death follow in another, the party may be indicted or complained of in either county. So, if one steals goods in one county and carries them into another county, as has been before stated, he may be complained of in either.<sup>5</sup>

This prescribed locality within which criminal proceedings must be commenced and prosecuted is called the venue, being the place from which some

<sup>1</sup> Gen. Stat. Mass. c. 170, § 10, *Commonwealth v. Wilcox*, 1 Cush. 504, 505; 1 Chit. C. L. (Perk. ed.) 38 and note, 39; 1 Eish. Cr. Proc. §§ 217, 218. See Rev. Stat. Ill. 401, § 349; 2 Comp. Laws, Mich. 1871, § 7845; Code, Iowa, 1873; § 4186; R. S. N. Y. pt. 4, c. 2, tit. 2, § 3.

<sup>2</sup> So in Iowa. Code, Iowa, 1873, § 4160.

<sup>3</sup> So in Michigan and Illinois. 2 Comp. Laws, 1871, § 7808; Rev. Stat. Ill. 1874. 406, § 396.

<sup>4</sup> 1 Chit. C. L. 184; Gen. Stat. Mass. c. 171, § 17.

<sup>5</sup> 1 Chit. C. L. (Perk. ed.) 179, 180, note; Gen. Stat. Mass. c. 171, § 18; *Commonwealth v. Rand*, 7 Met. 476; *ante* p. 63, note.

of the jury must come who are to try the case.<sup>1</sup> But it does not include the place within which the process for arresting the party charged may be served. That may be done at any place within the State. And in Massachusetts an officer of one county may serve a warrant for arresting a party charged in another county and bring him before the court or magistrate issuing it. In England this purpose is accomplished by having the warrant "backed" or indorsed by a magistrate of the county in which the warrant is to be served.<sup>2</sup>

What an arrest is, how, when and where it may be made, will be treated of hereafter; but for the present assuming it to have been made, the officer brings the party before the magistrate who issued the warrant, or in the States where this is allowed, before some other magistrate with the warrant with a proper certificate of service made thereon, with a proper certificate of summons having been made upon the witnesses, when, if no sufficient cause of delay is interposed, the examination is commenced.<sup>3</sup>

<sup>1</sup> Termes de la Ley, Venue or Visne.

<sup>2</sup> Gen. St. Mass. c. 170, § 11; Rev. Stat. Ill. 1874, 401, § 352; 2 Comp. Laws Mich. 1871, § 7846; Code, Iowa, 1873, § 4190; Rev. Stat. N. Y. pt. 4, c. 2, tit. 2, § 4; 1 Chit. C. L. 45.

<sup>3</sup> When "other magistrate" is mentioned, it must be a magistrate competent to hear and try the case. Thus, where, as in Massachusetts, "trial justices" only could hear and try complaints for criminal offenses, though justices of the peace might receive them and issue warrants thereon, but could not try them, such warrant must be returned before a trial justice, or a magistrate competent to hear and try it. *Stetson v. Parker*, 7 Cush. 564.

It should be remarked that although the officer shall have delivered to the magistrate the warrant by virtue of which he has arrested the accused, when he has once taken him into custody and brought him before the magistrate, he is still considered to be in the custody of the officer until he is either discharged, bailed or committed to prison. And, it seems, the officer may, for his protection, retain possession of the warrant, and only return to the justice what he has done under it, though it is apprehended that the usual mode is to deliver the warrant with the return to the magistrate.<sup>1</sup>

After the officer has brought the party whom he has arrested before a magistrate, for trial or examination, the magistrate is allowed a reasonable time for this purpose before making his final decision. In England the delay is from three days to three days, during which the magistrate may commit the accused by a *mittimus*. In Massachusetts the magistrate may adjourn an examination for not exceeding ten days, and, in the meantime, require the accused to recognize for his appearance, if the offense is a bailable one, which will be hereafter explained, or commit him to prison.<sup>2</sup>

<sup>1</sup> 1 Chit. C. L. 60. See Foster's case, 5 Co. 59; 2 Hale P. C. 120.

[The statutes of some of the States provide in terms that the warrant, with a proper return indorsed thereon, shall be delivered to the magistrate. Gen. Stat. Mass. c. 170, § 16; Rev. Stat. N. Y. pt. 4, c. 2, tit. 2, § 12; 2 Comp. Laws Mich. 1871, § 7851; Rev. Stat. Ill. 1874, 402, § 355.]

<sup>2</sup> 1 Chittÿ, C. L. 74; Gen. St. Mass. c. 170, § 17; [Rev. Stat. Ill. 1874, 402, § 356. In Michigan the statute (2 Comp. Laws, 1871, § 7852) allows an adjournment from time to time as may

As to the mode of examination of a party accused, that by the English law differs in many important respects from the American. Thus, in England the accused has no right to have the presence and aid of counsel during such examination. But he has a right to be present while the witnesses called against him are testifying, and cross-examine them. In Massachusetts the accused may employ counsel to aid him in conducting the examination, and in both the accused may produce witnesses, who shall be examined under oath. In England the accused is examined by the magistrate, but not on oath, and his examination is taken in writing<sup>1</sup> and is signed by him, but he is not obliged to answer<sup>1</sup> so as to accuse himself, unless it be voluntarily done. This examination may be used in evidence against the accused. In examining the witnesses against the accused, only one is allowed to be present at the same time. In Massachusetts the magistrate may, if he sees fit, exclude all the witnesses except the one testifying, during the examination.<sup>2</sup> But no provision is made for examining the party accused, except that now by statute he may testify as a witness if he requests it.<sup>3</sup>

be necessary. See *Pardee v. Smith*, 27 Mich. 43; *Hamilton v. The People*, 29 id. 176; Tiff. C. L. 89. In Iowa, (Code 1873, § 4230,) no examination can be adjourned for a longer period than 30 days.]

<sup>1</sup> So in New York. R. S. pt. 4, c. 2, tit. 2, § 14.

<sup>2</sup> So in Illinois, Iowa, Michigan, and New York. Rev. Stat. Ill. 1874, 402, § 361; 2 Comp. Laws Mich. 1871, § 7857; Code, Iowa, 1873, § 4239; Rev. Stat. N. Y. pt. 4, c. 2, tit. 2, § 18.]

<sup>3</sup> 1 Chit. C. L. (Perk. ed.) 74-87, notes; Rev. Stat. Ill. 1874,



Under the system in use in this country these examinations become in effect trials of the issue of guilty or not guilty, by the magistrate, unless, as is not infrequently the case, if the charge is of a grave character, the defendant waives a full examination and recognizes for his appearance at a higher court. If upon this trial the magistrate finds the accused guilty, and the offense is one within his jurisdiction, he proceeds to pronounce sentence, from which the defendant may appeal; or, if the offense transcends the jurisdiction of the magistrate, he proceeds to require him to recognize for his appearance at the higher court or be committed to jail to await proceedings in the higher court.

The ordinary judgment and sentence in cases cognizable by the magistrate, if the accused is

410, § 426; Gen. Stat. Mass. c. 170, § 20-22; Stat. Mass. 1870, c. 393; Code Iowa, 1873, § 4237.

[In Michigan the prisoner may make a statement (not under oath) and may be cross-examined upon such statement. 2 Comp. Laws, 1871, § 5967; Tiff. C. L. 101, and cases cited.]

The contrast between the mode of examining parties accused of crimes in our own country and the continental States of Europe deserve a passing remark. In France, for example, if one suspected of crime is arrested, he is at once shut up in prison until the proper magistrate is ready to examine him. No bail is allowed. This sometimes is as long as ten days, during which time he can hold no communication with his friends. If, upon his examination, the magistrate is in doubt whether to discharge him or not, his detention may be continued months. His examination consists of written interrogations, which he is obliged to answer, which are artfully designed to lead him to convict himself, while the prisoner has no right to the aid of counsel. 23 Law Rev. 265, 347.

found guilty, is that he shall pay a fine, or that he shall be imprisoned for a definite period ; or, as is sometimes done, pay a fine or be imprisoned; and if the sentence be imprisonment, or if a fine, and the defendant neglects or refuses to pay it, the magistrate makes out and delivers to the officer a warrant under his hand and seal, called a *mittimus*, commanding him to commit the defendant to prison, and commanding the keeper to receive and detain him in prison, according to the precept in said warrant.

In case the order of the magistrate is that the defendant recognize for his appearance at the higher court, and he fails to do so, or if the offense with which he is charged is not bailable, the magistrate makes out and delivers to the officer a like *mittimus*. This *mittimus* the officer delivers with the prisoner to the prison keeper, with his return of his doings thereon, and this is the authority by which he holds the prisoner in custody.

This *mittimus* should be in the name of the Commonwealth or the People, as the usage of the State may be, and should state the name or description of the party to be committed, the offense with which the defendant is charged, or has been convicted, with clearness and certainty, and the reason for issuing the *mittimus*. It should also direct as to the time of imprisonment, as where there is a definite period imposed as a sentence, or till the defendant finds sureties and the like, in all cases concluding with a direction to detain the party until discharged by due course of law.<sup>1</sup>

<sup>1</sup> 1 Chit. C. L. 109-114.

To recur once more to the examination and measures consequent thereon, the accused, when arrested and brought before the magistrate, is arraigned or called upon to answer to the complaint which is then read to him. If he refuses to answer, or does not admit the charge to be true, the magistrate treats it as a plea of not guilty, and proceeds with the hearing.<sup>1</sup>

The prosecutor, by himself or counsel, unless the prosecuting officer of the government sees fit to assume the charge of the prosecution, usually conducts the examination on the part of the government; and the defendant, as has been stated, may be heard in defense by himself or his counsel. If the offense charged be within the cognizance of the magistrate, and he finds the defendant guilty, he proceeds to pass sentence upon him, from which an appeal may be taken to the higher court. In that case the respondent must either recognize for his appearance at such higher court, then and there to prosecute his appeal, and abide the sentence of the court, or, if he fails to do this and to offer satisfactory sureties with him for his appearance at such higher court, the magistrate issues a *mittimus*, as above mentioned, for his commitment to prison.

If the offense charged is beyond the cognizance of the magistrate, and he is satisfied upon the examination that there is probable cause to believe the defendant guilty, he orders him to recognize for his

<sup>1</sup> 1 Mass. Gen. Stat. 171, 29. [This section of the statute refers to the arraignment of the prisoner upon the indictment, and not to the preliminary examination before the magistrate.]

appearance at the higher court to answer to the charge; and, if he fails to comply with the order, the magistrate issues his *mittimus* for his commitment to jail.

Another step in the process on the part of the magistrate, is to require the witnesses whose testimony he deems important in behalf of the prosecution, if the case is to be carried by appeal or by order of the magistrate to a higher court, to enter into a recognizance for their appearance at the higher court to testify in the matter in respect to which they have appeared before him. Whenever a magistrate is authorized to require a recognizance, he may also require the party entering into it to furnish one or more satisfactory sureties for the performance of the condition thereof, though he may take such recognizance of the party alone. This applies also to the case of witnesses. If he thinks it proper to require of the witness a surety, or sureties, to enter into a recognizance with him for his appearance at court to testify, he may do so; and, if the witness is unable to furnish, then, he may commit him to prison.<sup>1</sup>

Where a party or witness is committed to prison for failing to recognize as above stated, there are provisions made by statute whereby he may furnish such recognizance at a subsequent time and be discharged from imprisonment.<sup>2</sup>

[<sup>1</sup> By statute in Illinois, it is provided that no such witness shall be required to give other security than his own recognizance for such appearance. Rev. Stat. Ill. 1874, 403, § 364.]

<sup>2</sup> Gen. Stat. Mass. c. 170, § 25-29, 36; 2 Comp. Laws, Mich. 1871, § 7865; Rev. Stat. Ill. 1874, 396, § 299.

A recognizance such as is above mentioned is an oral agreement in presence of the magistrate, and of which he makes a record, either separately or jointly and severally with sureties, to pay a certain sum of money as a penalty fixed as to amount by the magistrate, to be levied upon the goods and chattels of the recognizers, and in default thereof upon their bodies,<sup>1</sup> if the principal fails to comply with the order for his appearance at the court to which it is returnable and perform the condition thereof.<sup>2</sup>

In all those cases where a matter is to pass from the cognizance of a magistrate to the higher court, the magistrate makes certified copies of all the papers that have been laid before him, including copies of all recognizances<sup>3</sup> entered into before him, and recorded by him, together with a copy of the complete record of the proceedings before him, and transmits these copies to the court above, and these become the basis of whatever future action such court may lawfully take in the premises.<sup>4</sup>

If a case comes before the superior court by ap-

<sup>1</sup>Or "lands and tenements." See Moore, C. L. p. 78; Tiff. C. L. 113.

<sup>2</sup>1 Chit. C. L. 89, 90; Gen. Stat. Mass. c. 170, § 39.

<sup>3</sup>[In Illinois "all recognizances taken in criminal cases shall be delivered to the clerk of the court before which the accused or witness is bound to appear, on or before the day mentioned in such recognizance for his appearance." Rev. Stat. 1874, 396, § 304.]

<sup>4</sup>Gen. St. Mass. c. 170, § 40; 1 Chit. C. L. 91, 720.

[In Iowa the original papers are returned to the court above. Code, 1873, § 4252. So, in Michigan and New York the examinations and recognizances are certified to the court above. Rev. Stat. N. Y. pt. 4, ch. 2, tit. 2, § 28; 2 Comp. Laws, Mich. 1871, § 7867.]

peal for trial, it proceeds upon the complaint made to the magistrate as if the same had originated in such court, since the judgment of the magistrate has been vacated by such appeal, the only difference between such a trial and ordinary cases in such court being that one proceeds upon the original complaint, and the other upon an indictment found by a grand jury.<sup>1</sup>

With these copies coming from the magistrate or court appealed from, the prosecuting officer, where there is one, as is believed to be universally the case in the United States, is enabled to bring the subject matter of the complaint intelligently before the grand jury for their action.

## II. INDICTMENTS AND INFORMATIONS AND PROCEEDINGS THEREON PRIOR TO THE TRIAL.

Another mode of bringing matters to the notice and consideration of the grand jury is through the prosecuting officer, who, upon oral complaint or information of a crime having been committed, lays the same before the grand jury and brings before them the requisite witnesses and evidence to establish the charge.

In whichever way the subject matter is brought to the notice of the grand jury with a view of having them pass upon the question of finding and returning an indictment against the party charged with an offense, it is for them to hear and consider

[<sup>1</sup> See Rev. Stat. Ill. 1874, 406, § 389; Tiff. C. L. 206; *Guenther v. Whiteacre*, 24 Mich. 504. As to the limit of punishment on appeal, see *Matter of Jerry Irwin*, 29 Mich. 43.]

the evidence which the prosecution may offer *ex parte*; and, if they are reasonably satisfied that he is guilty, they make this known to the court which is to have cognizance thereof, by an indictment, the form and mode of finding which will be more fully stated further on.

Another mode of bringing to the cognizance of the court a charge against a person of having committed an offense, is by what is called an information, which is in substance like an indictment, but made by the proper prosecuting officer upon his own responsibility, instead of having the same first passed upon by a grand jury. By the English law, "an information is a declaration of the charge or offense against any one at the suit of the king."<sup>1</sup>

In some of the States this is the only mode of commencing criminal prosecutions in other than magistrates' courts. In others it may be adopted. The Constitution of the United States requires the presentment or indictments by a grand jury before any one can be held to answer for a capital or infamous crime. And in most of the States, informations, though in use, partake more of a public civil prosecution than a criminal one.<sup>2</sup>

<sup>1</sup> Com. Dig. Information, A. 1; 1 Bish. Cr. Proc. § 147; 1 Chit. C. L. 166.

<sup>2</sup> 1 Bish. Crim. Proc. §§ 144, 145; U. S. Const. 5 Amend't; Const. of N. Y. 1875, Art. 1, § 6; Const. Ill. 1870, Art. 2, § 8; Mass. Gen. St. c. 158, § 3; *id.* chap. 141. Among the States wherein informations, as a mode of criminal prosecution, are in use, are Michigan, Connecticut, Louisiana, Missouri, New Hampshire and Vermont. See 2 Comp. Laws, Mich. 1871, § 7937; Tiff. Cr. L. 340.

In Massachusetts, as under the United States Constitution, no person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in cases where an information is expressly authorized by statute, in proceedings before a police court or justice of the peace, or in proceedings before courts martial.<sup>1</sup>

*Grand Juries.* The institution of grand juries is of English origin and not in use, it is believed, upon the continent. Blackstone speaks of it as being fully described as early as the laws of King Ethelred.<sup>2</sup> The number of which they are composed and their general powers and duties are determined by the common law. But their qualifications as well as the mode of selecting and returning them are regulated by the statutes of the several States, the details of which would occupy too much space for the plan of this work.<sup>3</sup> Their number must be at least twelve and may be twenty-three, since no bill of indictment can be lawfully returned against any one by a less number than twelve jurors.<sup>4</sup>

These jurors are summoned and convened by vir-

<sup>1</sup> Gen. Stat. Mass. c. 158, § 3. See, also, Const. N. Y. 1875, Art. 1, § 6: Const. Ill. 1870, Art. 2, § 8.

<sup>2</sup> 4 Black. Com. 302.

[<sup>3</sup> See Gen. Stat. Mass. c. 171; Rev. Stat. Ill. 1874, 631, § 9. In Illinois a full panel of the grand jury consists of twenty-three persons, of whom sixteen are sufficient to constitute a grand jury. Rev. Stat. 1874, p. 634. In finding an indictment, at least sixteen shall be present and at least twelve of them shall agree to the finding. Rev. Stat. Ill. 1874, 408, § 407.]

<sup>4</sup> 1 Chit. C. L. 306, 322; Commonwealth v. Wood, 2 Cush. 151; Gen. St. Mass. c. 171, § 1. See next note, *supra*. In



tue of a precept from the court called a "*venire facias*," addressed to the proper officer, to be executed in the mode pointed out by the statute of the State, requiring them to attend the court at a prescribed time, and a return of the names thus summoned is made to the court, from which a list of the persons to serve as such is made by the clerk of the court preparatory to their being impaneled.<sup>1</sup>

If a grand jury is not drawn and returned by a proper officer no indictment found by them would be good, and, if found, would be set aside on motion of the prisoner.<sup>2</sup>

The mode of impaneling a grand jury is substantially the same in England and this country. The clerk of the court makes out an alphabetical list of the names returned, and these are called and sworn. In England the foreman is first sworn and then the rest of the panel,<sup>3</sup> three at a time. In Massachusetts the two first on the list are first sworn, and then the rest in such sections as the court may direct, though it is generally regulated by usage.<sup>4</sup>

The oath administered to grand jurors indicates pretty fully the duty they are to perform, and in Massachusetts is in the following words, (which is

some States a less number than twenty-three may be summoned, but it requires the concurrence of twelve at least to find a bill of indictment, 1 Bish. Crim. Proc. § 854.

<sup>1</sup> See Gen. Stat. Mass. c. 171; Rev. Stat. Ill. 1874, 631, § 9.

<sup>2</sup> Iowa v. Bradt, 9 West. Jur. 587; Com. Dig. Indict. A. See Moore, C. L. § 774.

[<sup>3</sup> In Illinois, first the foreman and then the other jurors. Rev. Stat. 1874, 64, § 18.]

<sup>4</sup> 1 Chit. C. L. 32, 313; Gen. Stat. Mass. c. 171, § 5.

substantially like the one taken in England, and is borrowed in effect from the form required by the law of Ethelred,) that they “will diligently inquire and true presentment make of all such matters and things as should be given them in charge; the commonwealth’s counsel, their fellows’, and their own, they will keep secret; they shall present no man for envy, hatred, or malice, neither shall they leave any man unpresented for love, fear, favor, affection, or hope of reward; but they shall present things truly, as they come to their knowledge, according to the best of their understanding.” The old English form was that “they would accuse none whom they believed innocent, nor conceal any whom they thought guilty.”<sup>1</sup>

Instead of repeating this oath at length to each of the sections, they are simply sworn to well and truly keep the oath which has been administered to their fellows who have been first sworn.

When this has been done it is customary for the court to instruct the jury by what is called a charge, as to their duties. In England these charges take a pretty wide range, having “reference to local objects, events, discussions, and concerns”—and were formerly much more extended in this country than they now are.<sup>2</sup>

The jury then retire under the charge of an officer appointed for that purpose and duly sworn.<sup>3</sup> In

<sup>1</sup> Crown L. C. 6, 481; 8 Sir Wm. Jones’ Works, 58; Gen. Stat. Mass. c. 171, § 5; Rev. Stat. Ill. 1874, 334, § 18.

<sup>2</sup> 1 Chit. C. L. 312.

<sup>3</sup> See Rev. Stat. Ill. 1874, 407, § 403; Gen. Stat. Mass. c. 171, § 7.

Massachusetts the first business of a grand jury is to choose a foreman<sup>1</sup> and clerk, and to return the name of the foreman to the clerk of the court to be recorded. They are then ready to receive complaints and act thereon.

In England, where there is no public prosecuting officer, the person prosecuting an offender either draws, or procures some one to draw, a bill of indictment, setting forth, with all due particularity, the offense intended to be charged, which he lays before the grand jury, with a list of the witnesses to be examined thereon; and if twelve of these are reasonably satisfied that the charge is sustained by the proof offered, they indorse thereon "a true bill," and the same is then ready to be returned into court. If they are not thus satisfied, they indorse thereon "not a true bill,"<sup>2</sup> or "not found," formerly "*ignoramus*," and no further action is had thereon. The jury then return these bills to the court and their function is completed. In some of the English courts there is an officer called "the Clerk of the Grand Juries," who attends before the jury and conducts the examination of the witnesses, and the prosecutor is not allowed to be present. In other of their courts the prosecutor is allowed to be present and conduct the examination on the part of the

<sup>1</sup> [Gen. Stat. Mass. c. 171, § 7. The court appoints the foreman in Illinois. Rev. Stat. 1874, 624, § 17.]

<sup>2</sup> [Rev. Stat. Ill. 1874, 634, § 17, where in either case such indorsement is required to be subscribed by the foreman. Where a true bill is found and returned into court, the names of the witnesses upon whose evidence it was found are also required to be noted thereon.]

crown. The witnesses are generally limited to such as are named upon the complaint or bill of indictment, though the jury are at liberty to seek other information upon the points which they are to consider. And it may be repeated that the same proceedings are had before the grand jury whether the complaint originates there or preliminary measures have been taken before a magistrate.<sup>1</sup>

The witnesses who are to be called before the grand jury are compellable to appear by a subpoena requiring their attendance, and, if after due notice to appear, any witness fails to obey the subpoena, a process of attachment, so-called, may be issued by the court, upon which he may be arrested and brought before the court. So, if he has been recognized before the magistrate for his appearance at the court, and fails to appear, he may be arrested by order of the court and compelled to attend. Nor is a jury at liberty to find a bill upon the testimony of a witness not under oath; and, if they receive such evidence, the indictment may be quashed.<sup>2</sup> The witnesses when called are sworn in open court.<sup>3</sup>

The proceedings before grand juries in this country differ somewhat from those in England, though substantially the same. In the first place, there is a public prosecuting officer, through whom all original complaints are brought to the attention of the jury. He calls the witnesses and examines them

<sup>1</sup> 1 Chit. C. L. 315-318, 322-325.

<sup>2</sup> 1 Chit. C. L. (Perk. ed.) 319, and note; ib. 320, 322.

<sup>3</sup> 1 Chit. C. L. 322.

in the presence and hearing of the jury, and explains the nature of the offense charged. After this hearing the jury proceed to vote upon the question of the guilt of the accused, at which the prosecuting officer is not present. If twelve at least vote in the affirmative, this officer then draws up a formal indictment, instead of its being previously prepared as in England, which the foreman signs, certifying it to be a true bill.<sup>1</sup> In Maine, [Illinois and Iowa], it would be fatal, if the foreman omitted to certify it to be a true bill; but in Massachusetts and some other States such omission would not be material, and if he sign it, certifying it to be a true bill, it legally imports that it has been found by at least twelve grand jurors.<sup>2</sup>

Ordinarily the prosecuting officer countersigns the bill of indictment when found; but it is not necessary for him to state for what district he is acting, and in some States he may omit his signature altogether; in others it is required to give the bill validity.<sup>3</sup>

The foreman of the grand jury is authorized to administer an oath to the witnesses called before

<sup>1</sup> See Rev. Stat. Ill. 1874, 634, § 17; Beecher's Breesc, 145, note.

<sup>2</sup> Low's Case, 4 Greenl. 453; Webster's Case, 5 Greenl. 432; *Nomaque v. The People*, Breese, 109, (Beecher's ed.) 145, and note; *Gardiner v. The People*, 3 Scam. 83; *Dutell v. The State*, 4 G. Greene, 125; *Commonwealth v. Smyth*, 11 Cush. 473; *Turns v. Commonwealth*, 6 Met. 224, 233; 1 Bish. Crim. Proc. §§ 698, 700, and note; Moore, C. L. § 811.

<sup>3</sup> *Commonwealth v. Beaman*, 8 Gray, 499; 1 Bish. Crim. Proc. § 702, and cases cited.

them,<sup>1</sup> or this may be done by the prosecuting officer; and a list of these witnesses is to be returned by the foreman to the clerk of the court.<sup>2</sup>

When a grand jury shall have completed the inquiries before them, and found one or more indictments upon complaints brought before them, they return into court with the bills thus found, and the foreman hands them to the clerk of the court, who enters them as a part of the records of the court, and they are thereupon discharged, unless their term of service extends beyond the term at which they make their presentments.<sup>3</sup>

Although the right to inquire of grand jurors as to what takes place in the jury room, is exceedingly limited and restricted, it is competent to require them to testify whether twelve of the panel united in finding any bill returned by them; but they may not be inquired of how any one of the panel voted upon the question.<sup>4</sup>

<sup>1</sup> So in Illinois also. Rev. Stat. 1874, 634, § 17.

<sup>2</sup> Gen. St. c. 171, § 9; 1 Bish. Crim. Proc. § 868.

[In Illinois the names of the witnesses upon whose evidence the indictment is found, are required to be noted on the indictment. Rev. Stat. 1874, 634, § 17; Moore, C. L. § 811, *et seq.*]

<sup>3</sup> 4 Greenl. 444.

[Before the accused can be tried upon an indictment, the record must show that it was returned in open court. *Gardiner v. The People*, 3 Scam. 83; s. c. 20 Ill. 430; *Kelley v. The People*, 39 Ill. 157; *Rainey v. The People*, 3 Gilm. 71; *Aylesworth v. The People*, 65 Ill. 301; *Yundt v. The People*, *id.* 373; Moore, C. L. § 815. As to recording indictments, see Rev. Stat. Ill. 409, § 413.]

<sup>4</sup> *Low's Case*, 4 Greenl. 440; 1 Bish. Crim. Proc. § 857. See Rev. Stat. Ill. 1874, 408, § 412.

*Arraignment and Plea.* As soon as an indictment has been returned by the grand jury and filed in court, the matter is in sufficient forwardness to arraign the party therein charged to answer to the same, if he is in custody, or is present in court upon his recognizance. And the prosecuting officer often detains the grand jury after making a return of their indictments, until such of the persons therein charged as are in custody, are arraigned and called to plead to the indictment, so that, if any of them pleads in abatement to the process for a misnomer, he can indict him again under his true name without causing delay thereby in the business of the court. The arraignment of a prisoner to answer to an indictment consists in his being brought in, in custody of an officer, unless at large upon his recognizance, in which case he is voluntarily present, when the clerk calls him by name, directs him to stand and hearken to an indictment found against him by the grand inquest of the county. If the charge is a capital one, he is directed to hold up his hand. The indictment is then read to him in a deliberate and intelligible manner; and he is then inquired of what he has to say to the indictment, is he guilty or not guilty?<sup>1</sup> While this is being done the prisoner is freed from any chains or fetters, if he had any on when brought into court.<sup>2</sup> If he intends to take advantage of any defect in the proceedings, or any reason why he should not be tried upon the charge contained in the indictment, he is

<sup>1</sup> 1 Bish. Cr. Proc. §§ 728, 729; Moore, C. L. § 835.

<sup>2</sup> See Bish. Cr. Proc. § 731.

to take the objection before answering to it by a general denial of his guilt. Thus, if he denies the jurisdiction of the court, or that he is indicted by his true name, or relies upon a former conviction or acquittal of the same charge, he takes the objection before he admits or denies the charge by pleading guilty or not guilty; for, by so doing, he waives these objections, except that of jurisdiction, which is still open to him by a motion in arrest of judgment, to be explained hereafter.

The form and mode of taking these objections by plea will be considered in their proper place. They are mentioned here to indicate the order in which a party charged in an indictment is to take objection to his being put upon trial. Another mode may also be mentioned in this connection which is applied where there is some supposed fatal defect in the charge contained in the indictment or in the mode of stating it. This is done by what is called a demurrer, which denies the sufficiency of the indictment, even if the facts as stated are true, to convict the defendant of the crime charged; as for example, as given in Blackstone, indicting a man for feloniously stealing a greyhound, which is an animal in which no valuable property can be had.<sup>1</sup> If, however, there is a radical defect in charging what constitutes a crime, it may be taken advantage of by arrest of judgment as well as demurrer.<sup>2</sup>

A plea of misnomer is one in abatement; one of former acquittal or conviction is a special plea in

<sup>1</sup> See 1 Bish. Cr. Proc. § 741.

<sup>2</sup> *Ib.*



bar; and if the truth of such plea is denied, and a jury is called to pass upon the issue, and the verdict is against the prisoner, the judgment that follows is, in case the charge be one of felony, that the prisoner *respondeat ouster*, he should answer over or again to the charge. If the crime charged be a misdemeanor only, the judgment is as if the prisoner had pleaded guilty, or final against him, with some exceptions which will be mentioned hereafter. The same is true of a judgment upon demurrer against the prisoner; if the offense charged be felony, he is at liberty to plead over, or a new plea, but otherwise, if it be a misdemeanor, with few exceptions.

While, as will be stated, general pleas in bar, or a general denial of guilt, are made orally, those in abatement and special pleas in bar and demurrers, are ordinarily required to be in writing, and in many cases sustained by the oath of the party, in order to be received by the court, to prevent prisoners from interposing groundless obstacles in the way of proceedings in court.<sup>1</sup> The authorities upon which these several propositions rest will be more fully stated when the several pleas above mentioned are treated of later in the work.

If no objection by way of plea in abatement, demurrer or special plea, in bar is to be made, the prisoner when arraigned and called upon to answer to the charge, does this orally, by saying guilty,

<sup>1</sup> Gen. Stat. Mass. c. 171, § 31; 1 Chit. C. L. 436; *Rex v. Granger*, 3 Burr. 1617; *State v. Farr*, 12 Rich. 24; Rev. Stat. N. Y. pt. 4, c. 2, tit. 4, § 75.

or not guilty.<sup>1</sup> If the latter, it is deemed to be the general issue by which he puts himself upon the country for trial, or in other words, submits the question of his guilt to the finding of a jury.<sup>2</sup>

If the prisoner be deaf and dumb, an interpreter is appointed by the Court, who, being duly sworn, interprets and explains the purport of the indictment, and the prisoner's plea thereto.<sup>3</sup> The same course would be adopted if the prisoner were a foreigner unacquainted with our language.

If the prisoner stands mute, that is, refuses to plead to the indictment, the law of this country is different from the common law, and from what it formerly was here. By the common law, if he did this obstinately, after a due caution by the Court, he was subjected to a kind of torture, consisting of laying him upon his back, and then heaping heavy weights upon him till he either consented to plead

<sup>1</sup> See Rev. Stat. Ill. 410, § 423.

<sup>2</sup> 1 Chit. C. L. 417; 1 Bish. Cr. Pro. §§ 743, 799. The form of doing this and the minutes of the clerk of the fact preparatory to his making up the record of the case, while the Latin language was in use in court proceedings, gave rise in a somewhat curious manner to what is now a familiar word in our language. The clerk minuted upon the back of the indictment the prisoner's plea *non cul*, and the reply of the representative of the government that he is guilty, "*cul*," and that he is ready to prove it, "*prit*," which he read to the prisoner and then asked him how he would be tried, the conclusion being "*cul—prit*"—"how will you be tried?" from which the uninitiated supposed it was a term of reproach addressed to the prisoner. 1 Chit. C. L. 416; 4 Black. Com. 339.

<sup>3</sup> Commonwealth v. Hill, 14 Mass. 207; 1 Chit. C. L. 417; Rex v. Dyson, 7 C. & P. 305.

or was crushed to death.<sup>1</sup> In Massachusetts, if a person refuses to plead to an indictment, or does not confess it to be true, the Court treats it as a plea of not guilty, and proceeds with the trial as if such plea had been duly recorded. The prisoner need not be asked how he will be tried.<sup>2</sup>

The effect of a plea of guilty is to confess the truth of the facts recited in the indictment, and inasmuch as the prisoner may, in most cases, be sued in a civil action for the injury any one may suffer by his criminal act, he often is willing to save the prosecution the trouble of proving his guilt, if he can so plead as to avoid confessing the truth of that of which he is charged so that it can be used against him elsewhere. The mode of doing this which the courts sometimes allow, is by what is called *nolo contendere*, in which he says he will not contend with the Commonwealth or State according to the form of the indictment. It is limited to misdemeanors, and can only be received upon the discretion of the Court; and in some cases, by the Massachusetts statute, it requires the assent of the prosecutor.<sup>3</sup>

<sup>1</sup> 4 Black. Com. 324, 327.

This was once applied in the case of Giles Corey, by the Court appointed to try the witches in Salem, in 1692. Wash. Jud. Hist. 142.

<sup>2</sup> Gen. St. Mass. c. 171, § 29; Rev. Stat. Ill. 1874, 410, § 425; 2 Comp. Laws, Mich. 1871. § 7907; Rev. Stat. N. Y. pt. 4, ch. 2, tit. 4, § 74; 4 Cooley's Black. 324, note.

<sup>3</sup> 1 Bish. Cr. Proc. § 802, 803; 1 Chit. C. L. 431; Commonwealth v. Tilton, 8 Met. 233; Commonwealth v. Horton, 9 Pick. 207; Commonwealth v. Adams, 6 Gray, 359.

If to the indictment the prisoner answers that he is guilty, his confession is recorded and forms the basis of the judgment, which the Court thereupon renders against him. But this does not prevent his moving in arrest of judgment, if the indictment does not charge an indictable offense. The judgment of conviction in a criminal case is included in the sentence.<sup>1</sup> But in Massachusetts the Court will not receive a plea of guilty to an indictment for murder until after a full advisement of the prisoner of the consequences of such a plea.<sup>2</sup>

Although in Massachusetts there are two degrees of murder, and the indictment charges the offense generally and the jury are required to distinguish in their verdict whether they find the defendant guilty in the first or second degree, where there is a trial upon a plea of not guilty, yet if to such an indictment the defendant pleads guilty in general terms, it will be accepted and recorded as a plea of guilty of murder in the first degree, and judgment will be rendered thereon accordingly.<sup>3</sup>

A plea of guilty confesses all the facts charged in the indictment, together with the intent therein

<sup>1</sup> 1 Chit. C. L. 416; *Green v. Commonwealth*, 9 Allen, 165; *Commonwealth v. Tilton*, *sup.*; *Commonwealth v. Hinds*, 101, Mass. 209.

<sup>2</sup> *Commonwealth v. Batts*, 1 Mass. 95; 4 Black. Com. 328. [In Illinois it is enacted (Rev. Stat. 1874, 410, § 424,) that "in all cases where the party pleads 'guilty,' such plea shall not be entered until the Court shall have fully explained to the accused the consequences of entering such plea," &c.]

<sup>3</sup> *Green v. Commonwealth*, 12 Allen, 155; *Opinion, &c.*, 9 Allen 585.

charged, and is a waiver of all merely technical and formal objections. But, if the facts thus admitted do not constitute a crime against the law, there can be no valid judgment upon such a plea.<sup>1</sup>

In England the courts will not give judgment immediately in a capital case upon a plea of guilty, and four days are allowed to file a motion in arrest of judgment, if there are so many before the close of the term. They often advise the defendant to withdraw the plea of guilty and put himself upon trial.<sup>2</sup>

*Requisites of Indictments.* Before considering the steps in proceedings in criminal cases, which follow the finding and return of the indictment, by which the party therein charged is brought in to answer to the same, it is necessary to enter more at large into the requisites of a good and sufficient indictment, limiting the inquiry in the first place to such as apply to all indictments without regard to the particular offense intended to be charged.

It is defined to be "a plain, brief and certain narrative of an offense committed by any person and of those necessary circumstances that concur to ascertain the fact and its nature."<sup>3</sup> The importance of

<sup>1</sup> Commonwealth v. Hinds, 101 Mass. 210.

[In Illinois it is provided by statute (Rev. Stat. 1874, 410, § 424,) that "in all cases where the Court possesses any discretion as to the extent of the punishment, it shall be the duty of the Court to examine witnesses as to the aggravation and mitigation of the offense."]

<sup>2</sup> 1 Chit. C. L. 429.

<sup>3</sup> 1 Chit. C. L. 168; 2 Hale's P. C. 169.

this being done with sufficient accuracy in the form in which it is presented will be obvious when it is remembered that there was originally no amendment allowed, as in civil proceedings, since the statutes of jeofails do not extend to criminal proceedings.<sup>1</sup> Broad powers of amending indictments have been granted by statute in England.<sup>2</sup>

Another thing is to be borne in mind, that, inasmuch as the recitals in the preamble and close of an indictment, such as "unlawfully and deceitfully designing and intending," &c., "to the great damage," and the like, are not traversable, they cannot aid an imperfect averment of the facts constituting the description of the offense.<sup>3</sup>

In the first place, the indictment must charge the offense, including all the facts and circumstances constituting it, with as much certainty as the nature of the case will admit.<sup>4</sup>

If the charge is obtaining goods by false pretenses, it must state what these pretenses were. If it charge the felonious taking of another's goods, it must state what they were. If it charge the stealing of goods without alleging it to have been done feloniously, it would not charge the offense of lar-

<sup>1</sup> Barring. Stat. 220; *Brown v. Commonwealth*, 8 Mass. 65; Cro. C. Comp. 44; Moore, C. L. § 818, and cases there cited.

In Massachusetts amendments may be made in indictments for selling spirituous liquor. *Commonwealth v. Holby*, 3 Gray, 458.

<sup>2</sup> Cooley's Black. 307, note.

<sup>3</sup> *Commonwealth v. Hunt*, 4 Met. 128.

<sup>4</sup> *Stratton v. Commonwealth*, 10 Met. 220; 1 Chit. C. L. 171, 228; Moore, C. L. § 785.

ceny. So, if it charges stealing sheep without stating the number, it would be bad.<sup>1</sup>

The indictment must charge the facts and circumstances which constitute the crime, and a statement of the legal result only, would be bad.<sup>2</sup> So, if an act becomes unlawful by reason of circumstances and relations with which it is connected, it is necessary to set forth these as well as the act complained of. But if the offense consists not in a single act, but a series of single acts in continued succession, the indictment may charge the offense without stating in detail the various distinct acts which go to make the general criminality of the defendant. Of this class are common barrators, common scolds or brawlers, common sellers of liquor, and the like, to constitute which at least three several acts must be proved, though courts will require the prosecution to file a specification of the acts upon which a conviction will be sought.<sup>3</sup>

The charge, moreover, must be direct and positive; if in the disjunctive, as that he forged or caused to be forged, or by the way of a recital, as with a "whereas," it would be bad.<sup>4</sup>

<sup>1</sup> 1 Chit. C. L. 171, 228, 230; Cr. Cir. Comp. 37; FitzWilliams' case, Cro. Jac. 20.

<sup>2</sup> 1 Chit. C. L. 228; *Stratton v. Commonwealth*, 10 Met. 220.

<sup>3</sup> 1 Chit. C. L. 228, 231; *Stratton v. Commonwealth*, 10 Met. 220; *Commonwealth v. Pray*, 13 Pick. 359; *Commonwealth v. Davis*, 11 Pick. 432; *Bloss v. Tobey*, 2 Pick. 320, burning one's own house no crime, unless intended to defraud an insurance company, or the like.

<sup>4</sup> 1 Chit. C. L. 231; Cr. Cr. Comp. 40, 41; Moore, C. L. §§ 784, 788; *Rex v. Crowhurst*, 2 Ld. Raym. 1363; *Rex v. Whitehead*, 1 Salk. 371.

Attempts have been made by writers upon criminal procedure to define the degree of certainty with which averments should be made in framing an indictment, which fail to convey to common minds any distinct conception of what is intended. Thus, it is said "an indictment ought to be certain to every intent without any intendment to the contrary." Chitty says of accusations and indictments, the degree of certainty required is "certainty to a certain intent in general."<sup>1</sup> But, as the purposes of this accuracy and precision are in the first place to apprise the party charged, of the offense laid against him, and in the second place to have the record show, if he is indicted a second time, that he has once been held to answer to it, the rule as laid down in the Bill of Rights in the Constitution of Massachusetts would seem to furnish a reasonably satisfactory rule in such case, where it is said, "no subject shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally, described to him."<sup>2</sup>

It may, perhaps, aid in defining what it is necessary to aver in framing an indictment, to state that

<sup>1</sup> Long's case, Cro. Eliz. 490, a specimen of an indictment in Latin; FitzWilliam's case, Cro. Jac. 20; Chit. Plead. 237.

<sup>2</sup> § 12.

[It is provided by statute in Illinois (Rev. Stat. 1874, 403, § 408) that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." See, however, Moore, C. L. §§ 782, 783, and cases cited in note.]



it must rest altogether upon what it contains within itself ; and unless that clearly and directly charges a crime known to and punishable by the law, it is fatally defective. The inquiry, therefore, always is, can everything which is clearly alleged and set forth in an indictment be true, and yet the defendant be not guilty of the crime charged ? If it can, the defect is incurable, except by a new indictment. Thus, where an indictment [against the town of B.] alleged that a highway lay from a certain point in the town of A. to a certain point in the town of B., and that the inhabitants permitted a certain part of it to be out of repair and unsafe, it was held to be fatally defective, inasmuch as it did not aver that the part which was unsafe was within the town of B. All that was averred might be true, and yet the town of B. not guilty of any neglect of duty.<sup>1</sup>

Mere verbal errors, like misspelling a word, would not avoid an indictment, unless it, the error, was in describing the instrument forged, or the like. And where the allegation was that the prisoner took the goods alleged to be stolen from the "*possession*" of the owner, it was held not to be a ground for arresting judgment after a verdict.<sup>2</sup>

But, if it is intended to charge a felony, the indictment must allege the act to have been done feloniously. Such is the case with larceny, burglary, murder, etc. It is not enough to charge that the prisoner stole a horse, or broke a dwelling house,

<sup>1</sup> Commonwealth v. North Brookfield, 8 Pick. 463.

<sup>2</sup> State v. Williamson, 43 Texas, 500; 11 Am. L. Rev. 122; 2 Hale, P. C. 169; 1 Bish. Cr. Proc. §§ 348-354.

or slew a man. But by the statute of Massachusetts the omission of "feloniously" is not important if the act charged be a felony.<sup>1</sup>

Previous to 4 Geo. II. c. 26, indictments were in Latin, and, as stated by Hale, "it is of excellent use, because it being a fixed, regular language, it is not capable of so many changes and alterations as happen in vulgar languages." And this, it will be remembered, was true for a long period during which prisoners charged with felonies were not allowed the aid of counsel in the conduct of their cases. By the statute cited and that of 6 Geo. II. c. 14, (1731-1733,) indictments were required to be in the English language, in writing excluding figures and abbreviations, unless required in describing papers, and to be written in a legible hand.<sup>2</sup> But this use of figures and abbreviations is allowed in several of the States in describing the year and date of the finding of the indictment or the term of the court.<sup>3</sup>

In treating of the matters of an indictment in detail, the first point to be considered is the venue or the county in which it must be found, and the trial upon it be had. The right in criminal prosecutions

<sup>1</sup> 1 Chit. C. L. 173; Cro. Cir. Comp. 37; 4 Black. 307; Cro. Jac. 20; Cro. Eliz. 490; 1 Bish. Cr. Proc. § 534; Gen. St. Mass. c. 168, § 2; See Moore, C. L. §§ 789, 790.

<sup>2</sup> Hale, P. C. 169; 1 Chit. C. L. 175, 176; 1 Bish. Cr. Proc. § 344.

<sup>3</sup> Chit. C. L. (Perk. ed.) 176, note.

[Mr. Bishop in his work upon Criminal Procedure (Vol. 1, § 345,) expresses the opinion that, on the whole, the American doctrine is pretty plainly that figures are sufficient, though, where the subject is untouched by statute, there is some conflict upon the question.]

of having the facts verified in the vicinity where they happen, is declared to be one of the greatest securities of the life, liberty and property of the citizen.<sup>1</sup> The point aimed at by this rule is that crimes are to be tried and punished in the counties within which they are committed. In the sense of the law crimes are local.<sup>2</sup> Something has already been said of cases which occur where the act complained of has been of a continuous nature, and a part has occurred in one county and its consummation in another, as the infliction of a blow or administering poison in one county, and death ensuing in another.<sup>3</sup> Such would be the case of a nuisance created in one county causing injury in another.<sup>4</sup> Where the charge is of obtaining goods by false pretenses, and the making of the false pretense is in one State or county, and the goods thereby obtained in another, the indictment must be in the latter State or county.<sup>5</sup>

There is less particularity in setting out the vill, parish, etc., in which the act of felony is alleged

<sup>1</sup> Mass. Bill of Rights, § 13.

<sup>2</sup> 1 Bish. Cr. Proc. § 49; 1 Chit. C. L. 177; Commonwealth *v.* Quinn, 5 Gray, 480.

In Alabama it is not necessary to allege the place in which a crime was committed, though it is necessary to prove it to have been done in the county in which the indictment is found. 1 Bish. Crim. Proc. § 385.

<sup>3</sup> *Ante*, p.—.

<sup>4</sup> 1 Chit. C. L. 193; Mass. Gen. Stat. c. 171, §§ 17–19; 1 Bish. Cr. Proc. § 59; *Barden v. Crocher*, 10 Pick. 383.

<sup>5</sup> 1 Chit. C. L. 191; *Stewart v. Jessup*, 51 Ind. 413; *Adams v. People*, 3 Denio, 190, 610, where the letter was written in Ohio and the money obtained in New York.

to have been committed, in this country than in England. In Massachusetts the indictment for a capital felony names the town as well as the county, but in lesser offenses less strictness is required, though the indictment must state that the act is committed within the county, directly or by explicit reference to the county.<sup>1</sup> But if more than one county be named, and the language of the indictment leaves it doubtful which of the two is meant, it would be bad.<sup>2</sup>

In England and in some of the States, the court, for satisfactory reasons, may change the venue, or place of trial, from that in which the indictment is found, to another county. In other States this is not allowed.<sup>3</sup>

<sup>1</sup> 1 Chit. C. L. 196; *Commonwealth v. Springfield*, 7 Mass. 13; 2 Hale, P. C. 180; *Commonwealth v. Barnard*, 6 Gray, 488; *Commonwealth v. Cummings*, 6 Gray, 487.

[It is stated by Mr. Bishop (1 Crim. Proc. §§ 370, 371,) that, although the safer way in most cases is to allege the particular town, neighborhood, vill or parish where the offense is committed, yet the general rule in the United States is that it is not necessary to allege in the indictment the particular township or other like locality, within the county, where the offense was committed; and that it is sufficient simply to allege it to have been committed within the county. And such appears to be the rule. The exceptions to the rule and the cases upon the subject will be found collected by Mr. Bishop in the notes to the sections cited, and those immediately following them. See, also, Moore, C. L. p. 36, note 3; p. 321 note 2; p. 452, note 5.]

<sup>2</sup> 2 Hale, P. C. 180; 1 Bish. Cr. Proc. 379; *Commonwealth v. North Brookfield*, 8 Pick. 463.

<sup>3</sup> 1 Chit. C. L. (Perk ed.) 291, and note. Among the States where this may be done, are [Michigan,] New York, Alabama, Missouri, Virginia, Iowa, Illinois, Tennessee and Delaware.

After reciting that the grand jurors, under the name of the grand inquest, are such for the proper county, the indictment alleges that they "on their oaths present," whatever they intend to charge, and this is repeated in respect to every averment in the indictment, however numerous; and this is done in the present tense, as something they then do.<sup>1</sup>

Then follows the name of the person whom the grand jury intend to charge with the criminal act, and in this great particularity is required; first, in ascertaining and identifying the person to be arrested and held to answer; and second, to guard against the defendant being twice held for the same offense. By an early English statute not only was this required, but "the estate, degree or mystery" of the person charged, as well as the town, place or hamlet in which he was "conversant."<sup>2</sup> But, as has before been said, if the prisoner proposes to take advantage of a mistake or defect in this particular, he must do it by plea in abatement; and if he pleads generally to the indictment, he waives the objection.<sup>3</sup>

It seems now to be settled that both the Christian and surname must be given, but a mere mistake in

It is not allowed in Massachusetts or Vermont. 1 Bish. Cr. Proc. §§ 68, 69, and note; Rev. Stat. Ill. 1874, 1095, § 18; Comp. Laws, Mich. 1871, § 4946; Code of Iowa, 1873, § 4368; Moore, C. L. § 858; Tiff. C. L. 411.

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 202, note; 2 Hale, P. C. 168; 1 Bish. Cr. Pr. § 666.

<sup>2</sup> 1 Chitty, C. L. 203, 204.

<sup>3</sup> *Ante*, p. —; Commonwealth v. Lewis, 1 Met. 152; 1 Chit. C. L. (Perk. ed.) 203, note.

spelling it, where the sound is the same, is not material.<sup>1</sup> The appellation of junior, or 1st, or 2d, etc., annexed to a name, is no part of the name. And it is often said that the omission of a middle name or the initial by which it is indicated, is not material.<sup>2</sup> But the safer way, and what has at times been held the only safe way, is to describe the party charged by his full name.<sup>3</sup>

If the name of the party to be charged is not known, he may be indicted by such a description as will serve to identify the person intended, or by a fictitious name, with an averment that his real name is unknown. But in such case, there should be added some description which would identify and ascertain the person intended.<sup>4</sup>

If the defendant pleads a misnomer the prosecution may reply that he was known as well by one name as the other.<sup>5</sup>

The stringency in requiring a designation of the person charged by his title, degree, trade, &c., which

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 203, and note; 1 Bish. Cr. Proc. §§ 684, 688.

<sup>2</sup> Commonwealth v. Perkins, 1 Pick. 388; Cobb v. Lucas, 15 Pick. 7; 1 Bish. Cr. Proc. § 683.

<sup>3</sup> 1 Bish. Cr. Proc. §§ 683, 685.

<sup>4</sup> 1 Chit. C. L. 203; Commonwealth v. Crotty, 10 Allen, 403; 1 Bish. Cr. Proc. § 680.

<sup>5</sup> 2 Hale P. C. 238. In speaking of names, Coke, as upon everything else, is full of learning: "It is to be observed that *sur*nosme is derived of *sur* (*id est*) *super*, and *nosme* (that is) *nomen*, *quasi super nomen*, because it is superadded to the Christian name, which is legally *præ nomen*, in Latin, *cognomen*, *quia conjunctum nomen*." 2 Inst. 666, upon the Statute of Hen. V. of Additions.

once prevailed, has been much relaxed in this country, though still retained in some of the States. In England amendments in this respect are now allowed.<sup>1</sup>

When it is uncertain which of two Christian names is the true one, the difficulty may be avoided by alleging it with what is called an *alias dictus*, that is such a name, otherwise called the other name, and if either is proved to be the true name, it is sufficient.<sup>2</sup>

As to the name of the person alleged to be injured, or whose property has been taken, or in relation to whom some criminal act is charged in an indictment, the degree of precision and accuracy required is much more stringent than when confined to the defendant, and if a material mistake in this respect is made, it may be fatal even in arrest of judgment, if it appears upon the face of the proceedings. And, if the person intended be known, it would be fatal to describe him as being unknown. In some cases initial letters are allowed instead of the full name.<sup>3</sup> One reason for this strictness is to

<sup>1</sup> Chit. C. L. (Perk. ed.) 205-210, note; Mass. Gen. St. c. 172, § 19; 1 Bish. Cr. Proc. §§ 674, 675.

[By statute in Illinois no indictment shall be quashed for failure to state the occupation or place of residence of accused. Rev. Stat. 1874, 408, § 411. So, in Michigan. 2 Comp. Laws, 1871, § 7912.]

<sup>2</sup> 1 Bish. Cr. Pro. § 681; 1 Chit. C. L. (Perk. ed.) 216, and note.

<sup>3</sup> 1 Chit. C. L. (Perk. ed.) 213, 216, and note; 1 Bish. Crim. Proc. § 685; Cro. Cir. Comp. 36; 2 Hale, P. C. 181; Merwin v. People, 26 Mich. 298; 12 Am. Rep. 316.

protect the defendant from a second indictment for the same offense. But if the party be unknown and the defendant be convicted or acquitted, he may defend against a second indictment by showing the fact of the identity of the party alleged to be injured, with the one intended in the former trial.<sup>1</sup>

In this connection it should be borne in mind that, if one is charged with larceny, the indictment must state accurately the name of the owner whose goods have been taken. Thus, at common law, to allege that they were the goods and chattels of A. B., when it turns out that she is a *feme covert*, would be bad, because she cannot have goods independent of her husband. And if one robs a tomb or the body of a dead man by taking the shroud in which he is laid, or the clothes in which he is clad, the property in them is to be alleged to be in his executor or administrator, if he is known or can be found, otherwise the property should be alleged to be in a person unknown.<sup>2</sup>

Following the accredited forms of indictments, the next statement or recital in order, relates to the time, and the next the place, when and where the act charged to have been done, is alleged to have been committed. These are material allegations in an indictment.<sup>3</sup> There should be a time and place stated as to every traversable fact, though generally,

<sup>1</sup> 2 Hale, P. C. 181.

<sup>2</sup> 2 Hale, P. C. 181; *Wonson v. Sayward*, 13 Pick, 404; 3 Chit. C. L. 948; East, P. C. 652.

<sup>3</sup> Cro. Cir. Comp. 34-36; 2 Hale, P. C. 174, 177, 180; Moore. C. L. § 792.



when once done, it may be sufficient to refer to that by "then and there." And if the character of the act be affected by the hour of the day in which it happened, the same ought to be alleged, as in case of burglary it should be alleged to have been committed in the night time of such a day.<sup>1</sup> But unless time and place be of the essence of the crime charged, it is rarely necessary to prove either as laid, provided it be shown that the act was done before the finding of the indictment, and in a place which is within the jurisdiction of the court.<sup>2</sup> In homicide not only the time of the infliction of the blow should be averred, but that of the death.<sup>3</sup>

And it may be proper to state the offense to have occurred on a certain day, and on certain other days between that and some other day named when the act is capable of being continued, as in cases of nuisance.<sup>4</sup>

If the offense charged derives its character from the place in which it was committed, it becomes of the essence of the crime, and must be proved as alleged; as in the case of larceny in a dwelling

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 217, 219, 220, note; Hale P. C. 179; Moore, C. L. § 793; 1 Bish. Cr. Proc. § 408. [By the Act of April 10, 1877, (Sess. Laws. p. 85), the Statute of Illinois relating to burglary was amended by omitting the words "in the night time."]

<sup>2</sup> Hale, P. C. 179; Cro. Cir. Comp. 36; 1 Chit. C. L. (Perk. ed.) 224, note; 1 Bish. Cr. Proc. § 386, 387, 400; Commonwealth v. Harrington, 3 Pick. 29; Roscoe Ev. 101, 102.

<sup>3</sup> 1 Chit. C. L. 2 2.

<sup>4</sup> 1 Bish. Cr. Pro. § 392-395; Moore, C. L. § 797.

house, or burglary in breaking and entering a dwelling house of such an one, which must be proved as laid. A variance in such case would be fatal.<sup>1</sup> An indictment for keeping a disorderly house, will, however, be sustained by showing that defendant did this while occupying a room in another's house.<sup>2</sup>

The next, and a most essential part of an indictment, consists of charging the commission of the offense for which the defendant is to be held and tried. The indictment should contain upon its face such a description of this offense that the defendant should know and be able clearly to understand what is charged against him, and the court and jury should know what the offense charged is, and what judgment the law pronounces for the offense as charged. It must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime, and a statement of a legal result is bad. All the facts constituting the offense should be set forth as particularly as the nature of the case will admit.<sup>3</sup>

Presumptions of law need not be stated, nor need such facts as the Court are bound *ex-officio* to take notice of, such as public statutes (but not private ones), common law rights, general customs, divisions into counties, incorporation of towns, weights

<sup>1</sup> 1 Bish. Cr. Proc. § 573.

<sup>2</sup> *Commonwealth v. Bulman*, 118 Mass. 456.

<sup>3</sup> 1 Chit. C. L. 227, 228; *Commonwealth v. Tuck*, 20 Pick. 362; *Moore*, C. L. §§ 785, 787.

and measures, and the almanac, which is a part of the law of the land.<sup>1</sup>

It should state facts and not conclusions of law resulting from such facts ; this is the business of the court. But if an act is criminal by reason of being done with an evil intent, this intent must be alleged and proved. And in some cases it must be proved as alleged, as for example, if in charging burglary the intent be alleged to have been to steal, this must be proved. So that, if it is doubtful as to the true intent with which it was done, it is often advisable to charge different intents in separate counts.<sup>2</sup> But if the act be in itself unlawful, the intent need not be alleged, for the law presumes it.<sup>3</sup>

If the offense intended to be charged consists of writing some paper, such as forging a note, sending a threatening letter, or publishing a libel, and the like, the indictment must set out the writing with entire accuracy, giving it *verbatim*, and should either allege it to have been of the "tenor" following, which implies precise accuracy in the copy, or what would be equivalent "in these words," or "in the words and figures following."

"Purport," on the other hand, means the substance of the instrument, and where precision is required, it would not be sufficient to allege that

<sup>1</sup> 1 Chit. C. L. 231; 1 Greenl. Ev. §§ 5, 6, 479.

<sup>2</sup> 1 Chit. C. L. 231, 233; 1 Bish. Cr. Proc. §§ 522, 523; East, P. C. 1124.

<sup>3</sup> 1 Chit. C. L. 233; *Rex v. Farrington*, Russ. & R. 207; 1 Bish. Cr. Proc. § 1060; Mass. Gen. St. c. 168, § 2; *Commonwealth v. Hersey*, 2 Allen, 179. 180.

the writing was "to the effect," or "to the substance following :"<sup>1</sup>

But in stating a libel, it is only necessary to set forth so much of the matter as renders the offense complete, provided the part omitted does not in any way alter the sense of what is set out.<sup>2</sup> In an indictment for having in possession or passing a counterfeit bank note, it is not necessary to set out the check, letter or ornamental devices, and the like, upon the margin.<sup>3</sup> Nor is it necessary to set out an instrument which is in the defendant's hands, or, without the fault of the prosecution, cannot be produced; if this fact is stated in the indictment, it will be sufficient to give the same substantially, or by a proper description thereof.<sup>4</sup> Nor is it necessary to set out the words of an indecent paper, if its language is improper to be spread upon the record. In such case the indictment should state the reason for the omission, and only give a description of the book or paper.<sup>5</sup>

An indictment for perjury would be an example of the sufficiency of an averment in an indictment

<sup>1</sup> 1 Chit. C. L. 234, 235; East, P. C. 1122, 1124, (threatening letter); ib. 975, (a forged instrument); *Commonwealth v. Wright*, 1 Cush. 63, (a case of libel wherein the case of *Commonwealth v. Parmenter*, 5 Pick. 279, is questioned if not overruled); *Commonwealth v. Harmon*, 2 Gray, 291, (case of libel); *Commonwealth v. Houghton*, 8 Mass. 110, (forged bank notes.)

<sup>2</sup> 1 Chit. C. L. 235; *Commonwealth v. Harmon*, *sup.*

<sup>3</sup> *Commonwealth v. Taylor*, 5 Cush. 605; *Commonwealth v. Bailey*, 1 Mass. 62; *Commonwealth v. Stevens*, 1 Mass. 203.

<sup>4</sup> *Commonwealth v. Houghton*, 8 Mass. 110, 111.

<sup>5</sup> *Commonwealth v. Holmes*, 17 Mass. 336; *Commonwealth v. Tarbox*, 1 Cush. 72.

of the words or testimony constituting the perjury, being "of the purport," "effect" or "substance" following; and one obvious reason for this would be the impossibility in ordinary cases of reciting the precise words made use of by the witness in giving his testimony,<sup>1</sup> unless the perjury consists of a written affidavit, in which case it would seem to be necessary to set it out according to the "tenor" and not to the "effect" only.<sup>2</sup>

Whenever there is occasion to mention a number or quantity of articles collectively in an indictment, as in larceny of goods, or having counterfeit coins, it is necessary to state some certain number or quantity in figures or pounds, and the like, although it is not necessary to prove the same as laid. So, the character of the articles should be stated. It would not be sufficient to charge that the defendant stole sheep or cloth, or "the goods and chattels" of another; the number of sheep, or of yards of cloth, or the articles stolen, must be stated. So, charging a larceny of "one hundred and thirty-five dollars," the goods, &c., of another, without specifying what money it is, would be bad.<sup>3</sup> In one case, where the indictment charged the stealing of "sundry gold coins, current as money in this Commonwealth, of the aggregate value of twenty-nine dollars, but a

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 235, note; 2 Chit. C. L. (Perk. ed.) 310, and note; Cro. Cir. Comp. 357; 2 Bish. Cr. Proc. § 906.

<sup>2</sup> 2 Bish. Cr. Proc. § 906.

<sup>3</sup> 2 Hale, P. C. 182; East, P. C. 777, 778; *Commonwealth v. Griffin*, 21 Pick. 526; *Commonwealth v. Maxwell*, 2 Pick. 143; *Merwin v. People*, 26 Mich. 298; 12 Am. R. 316; 1 Chit. C. L. 236; Moore, C. L. p. 340, note 8.

more particular description of which the jurors cannot give," "and sundry bank bills, current as money, &c., of the aggregate value of thirty-three dollars, but a more particular description of which the jurors cannot give," it was held to be a sufficient specification of the articles charged to have been stolen.<sup>1</sup>

It is sufficient in describing the property taken or injured, which is made the subject of an indictment, to employ the same terms as are in general use for that purpose. As, for example, alleging a larceny of so many tons of barilla would be good, it being the name by which a certain kind of soda is known in the trade.<sup>2</sup> So, it would be a good description of the thing stolen, to call it "a bank note" of such a value.<sup>3</sup>

But a material mistake in the term by which an article is described in the indictment would be fatal, and for one reason, because of the necessity of properly guarding against a second indictment for the same offense, by referring to the record of the previous trial. Thus, where the owner of the printed sheets of a book delivered them to a binder to be bound into volumes, and after he had done this, he embezzled them, it was held bad to charge him with having embezzled so many printed sheets of such a book. They no longer answered to that name.<sup>4</sup> Among the cases given in the books, where the question of variance under such indictments has been made, is one in Ohio, that charging stealing a

<sup>1</sup> *Commonwealth v. Sawtelle*, 11 Cush. 142. See *Commonwealth v. Hussey*, 111 Mass. 434; *Moore*, C. L. p. 340, note 8.

<sup>2</sup> *Commonwealth v. James*, 1 Pick. 375.

<sup>3</sup> *Commonwealth v. Richards*, 1 Mass. 339.

<sup>4</sup> *Commonwealth v. Merrifield*, 4 Met. 468.

“gray gelding,” was not sustained by proving the taking of a “gray horse.” But where a declaration alleged the letting of a “horse” the Court held that evidence of letting a “mare” sustained the charge. A dead animal must be designated by the name by which it is usually called, as beef or pork, instead of an ox or swine.<sup>1</sup> But while it is important to describe an article which is the subject matter of an indictment with proper accuracy, it is often advisable to avoid unnecessary particularity in such description, since the proof must follow the description, and, if the allegation is larceny of a grey horse, proof of taking a black one would not sustain the charge. Mr. Roscoe refers to a case like that supposed, and mentions several others, such as where one took four live, tame turkeys in one county and killed them there, and then carried them into another county, where he was indicted for stealing four live turkeys, he was acquitted, they never having been alive in that county. He speaks, also, of the distinction between live and dead animals; if not alleged to be dead, they are presumed to be living, and must be proved to be so, to sustain the charge. So, the allegation of killing a mare is not sustained by proof of killing a colt, unless the gender is also proved.<sup>2</sup>

<sup>1</sup> *Hooker v. State*, 4 Ohio, 550; *Ware v. Juda*, 2 C. & P. 351; 1 Chit. C. L. 237; Roscoe, Ev. 94, 95.

[A charge of stealing “one pair of boots” is not sustained by proof of the larceny if two mismated boots, being the right boot of two pairs. *State v. Harris*, 3 Harring. 559.]

<sup>2</sup> Roscoe, Ev. 94-95; 2 Arch. Cr. Pr. & Pl. 348; *Rex v. Halloway*, 1 C. & P. 128.

Another material allegation in respect to articles alleged to have been feloniously taken is that they were the property of some one who is either known and must be named, or is alleged to be a person unknown, which will be sufficient if in fact the owner is unknown. But it will be sufficient if the property of the alleged owner in the article taken be a special one; though, if in possession of a servant of the owner, it would not give him such a special property as to sustain a charge of larceny for taking the goods from his possession.<sup>1</sup>

Another allegation in respect to articles of property, for the taking of which an indictment is found, is that they are of some measurable value, since larceny cannot be predicated of what is nobody's property, or of no value.<sup>2</sup> An example showing the necessity of care in this respect in framing an indictment was supplied in the following case: The indictment alleged the larceny of three articles of the value of a certain sum. The jury found the defendant guilty of taking one of the three things, and not guilty as to the rest. It was held that no judgment could be rendered, for it was nowhere alleged that the thing taken was of any value; the value alleged may have related to the other articles.<sup>3</sup>

<sup>1</sup> *Commonwealth v. Morse*, 14 Mass. 218; 2 Hale, P. C. 182; 3 Chit. C. L. 947, 948; East, P. C. 652; Moore, C. L. § 501.

<sup>2</sup> 3 Chit. C. L. 947; *Commonwealth v. Smith*, 1 Mass. 245; 2 Hale, P. C. 183.

<sup>3</sup> *Hope v. Commonwealth*, 9 Met. 134; *Commonwealth v. Lavery*, 101 Mass. 207; *Rex v. Forsyth*, Russ. & R. 274.

[See *State v. Buck*, 46 Me. 531, where it was held that if the jury found and in their verdict returned the value



But it is not necessary that the value should be proved as alleged in the indictment.<sup>1</sup>

The allegation of *vi et armis*, in respect to acts done, which was required in most cases when framing an indictment at common law, is rendered unnecessary by the statutes of Massachusetts, [Michigan and Illinois.<sup>2</sup>] The same is true as to its being alleged to be against the peace.<sup>3</sup>

If a guilty knowledge is essential to constitute a crime, as in case of uttering a false and forged bond or counterfeit bill, or receiving stolen goods, the indictment must allege the act to have been done "knowingly," or "well knowing," or words to that effect. But such an allegation would not render it necessary to prove it, if the law did not otherwise require it; it would be rejected as surplusage.<sup>4</sup>

*Separate Counts—Joinder of Offenses.* A question of great interest has been much agitated of late, how far it is competent in framing an indictment, to charge the same offense in different counts; or to charge different offenses in different counts of the same indictment; and, if this may be done, what is the effect if there be a general verdict of

of the part stolen, judgment might be legally rendered upon the verdict, although the indictment stated only the collective value of all the articles alleged to have been stolen.]

<sup>1</sup> 1 Chit. C. L. 238.

<sup>2</sup> Gen. Stat. Mass. 172, § 19; Rev. Stat. Ill. 1874, 408, § 411; 2 Comp. Laws. Mich. 1871, § 7912.

<sup>3</sup> Gen. Stat. Mass. c. 172, § 19; Cro. Cir. Comp. 42; Rice v. The People, 15 Mich. 17; 1 Chit. C. L. (Perk. ed.) 248, note.

<sup>4</sup> 1 Chit C. L. 241, and Perkin's note; East, C. L. 972; 1 Bish. Cr. Proc. § 504; Moore, C. L. § 791.

guilty, and a judgment thereon, and one of the counts should be held bad. The latter point was raised and decided in O'Connel's case, in the House of Lords, and the former one in the Court of Appeals of New York, in Tweed's case. It is laid down in the English books on criminal procedure, as an unquestioned right in a prosecutor to insert two or more counts in an indictment for the same offense, where it is uncertain whether the evidence will sustain the charge in one form or another, if the crime is of a complicated nature. "And no doubt can be now entertained that this course is as legal as it is advantageous, for it is even no objection, either upon demurrer or upon arrest of judgment, that *separate offenses of the same nature* are joined against the same defendant."<sup>1</sup> But two distinct offenses cannot be charged in the same count.<sup>2</sup>

By statute in Massachusetts two or more counts, describing different offenses, may be set forth in the same indictment, depending upon the same facts or transactions, provided the indictment contains an averment that the different counts therein are different descriptions of the same act.<sup>3</sup> But this is merely requiring that if the charges are in form for different offenses, but are intended to cover the same offense, it shall be so stated in the indictment. It

<sup>1</sup> 1 Chit. C. L. 248, 249; Moore, C. L. § 799, *et seq.*

<sup>2</sup> 1 Chit. C. L. (Perk. ed.) 248, and note; *State v. Nelson*, 8 N. H. 163; *Commonwealth v. Holmes*, 119 Mass. 198; 1 Bish. Cr. Proc. § 432; *Commonwealth v. Eaton*, 15 Pick. 274; *Commonwealth v. Symonds*, 2 Mass. 164; *Commonwealth v. Tuck*, 20 Pick. 360.

<sup>3</sup> Stat. 1861, c. 181.

is not intended to change the law as to the charging different offenses of the same nature, in different counts, in the same indictment.<sup>1</sup>

But when two crimes are of the same nature and necessarily so connected that they may, and, when both are committed, must constitute but one offense, they should be included in one charge. Of this character, is breaking and entering with an intent to steal, and stealing, which is one offense, the intent being shown by the actual stealing.<sup>2</sup>

So, there are cases where the charge of a higher offense embraces the elements of a lower one, and a conviction may be had for the lower, although the higher charge is not sustained. As in a charge for murder, are included that of manslaughter, battery and assault; and the lower may be established though the higher one fails. So, a battery includes an assault, and may be charged as one offense.<sup>3</sup> So, a felony by an act done to A, and one done to B, may be charged in one count, if they were done at the same time, as stealing a cloak of A B and a coat of C D.<sup>4</sup>

<sup>1</sup> *Commonwealth v. Cain*, 102 Mass. 488.

<sup>2</sup> *Commonwealth v. Tuck*, 20 Pick. 360, 361; *Josslyn v. Commonwealth*, 6 Met. 238, 239; *Commonwealth v. Hope*, 22 Pick. 1, 7; East, P. C. 515, 516.

<sup>3</sup> 1 Bish. Cr. Proc. § 433; 1 Chit. C. L. (Perk ed.) 250, and note; *Commonwealth v. Tuck*, 20 Pick. 361, (burglary and stealing and conviction of stealing); *Commonwealth v. Hope*, 22 Pick. 1; *Commonwealth v. Eaton*, 15 Pick. 275; 1 Whart. C. L. § 616, 617; Moore, C. L. § 800.

<sup>4</sup> *Carleton v. Commonwealth*, 5 Met. 533; 1 Bish. Cr. Proc. § 437.

Still the question recurs whether and how far distinct and independent crimes may be included in one indictment under separate and independent counts. If one is a felony and the other a misdemeanor, they may not be included in the same indictment.<sup>1</sup> The rule upon this point, as held in Massachusetts, is that several distinct substantive offenses may be included in the same indictment, where they are of the same general nature, and where the mode of trial and the nature of the punishment are the same.<sup>2</sup> A similar doctrine prevails in England, and New York and Pennsylvania.<sup>3</sup>

If including two or more offenses in the same indictment tends in any case, from the nature of the charges, to perplex the defendant in preparing and conducting his defense, the Court, in its discretion, may require the prosecutor to elect on which of the counts he will bring the defendant to trial, or may quash the indictment.<sup>4</sup>

If all the counts are good, there may be a gen-

<sup>1</sup> 1 Bish. Cr. Proc. 445. Otherwise in Maryland. 1 Chit. C. L. 254, note (Perk. ed.) citing *Burk v. State*, 2 H. & J. 426. See exception in New Jersey and in some other States, in § 446, 1 Bish. Cr. Proc. See Moore, C. L. § 800, and cases cited.

<sup>2</sup> *Carlton v. Commonwealth*, 5 Met. 534; *Josslyn v. Commonwealth*, 6 Met. 239; *Commonwealth v. Hills*, 10 Cush. 534; *Commonwealth v. Cain*, 102 Mass. 488; *Booth v. Commonwealth*, 5 Met. 535.

<sup>3</sup> 1 Chit. C. L. 249, note (Perk. ed.); *Kane v. People*, 8 Wend. 210, 211; *Commonwealth v. Gillespie*, 7 S. & R. 469.

<sup>4</sup> *Carlton v. Commonwealth*, *sup.*; Moore, C. L. § 800, and cases cited; *Commonwealth v. Cain*, 102 Mass. 489. 1 Chit. C. L. 249, limits this to felonies, and *ib.* 253, 254, says it does not extend to misdemeanors. See also, *Kane v. People*, *sup.*

eral judgment thereon, not exceeding the limit fixed by law for such offenses. If one count is good and the others bad, and judgment is expressly upon and limited to the good one, the insertion of the bad count and verdict upon it has no effect. So, if there are several counts, some good and some bad, and there is a general judgment, and it do not exceed the proper judgment for the good counts, the court will presume that it was rendered on the good counts alone.<sup>1</sup> In O'Connel's case, which was for conspiracy, there were eleven counts in the indictment, and a conviction and a general judgment and sentence upon all, and two of the counts were bad. Upon a writ of error to the House of Lords, in giving their opinion upon the point, seven of the judges were against a reversal and two for, and when it came to a vote in the House of Lords, two were against and three for reversing, and it was accordingly reversed.<sup>2</sup>

Upon the point that different offenses may be charged in the same indictment, if done in separate counts, Mr. Wharton speaks of it as a matter of unquestioned right, which would not vitiate the indictment if the offenses charged were misdemeanors.<sup>3</sup> The same rule applies to felonies in Massa-

<sup>1</sup> *Carlton v. Commonwealth*, 5 Met. 534; *Booth v. Commonwealth*, 5 Met. 535; *Josslyn v. Commonwealth*, 6 Met. 240; *Chit. C. L.* (Perk. ed.) 246, and note; 1 *Law Rev.* (London) 330, 338; 3 *Whart. C. L.* § 3047; *Kane v. People*, 3 *Wend.* 363.

<sup>2</sup> 11 *Clark & Fin.* 15; 3 *Whart. C. L.* § 3047; 1 *Law Rev.* (London) 329-344.

<sup>3</sup> 1 *Whart. C. L.* § 414. See, also, 1 *Bish. Cr. Proc.* § 452, note; *Moore, C. L.* § 801.

chusetts.<sup>1</sup> And two or more misdemeanors growing out of separate and distinct transactions may, according to the doctrine which appears to prevail everywhere, be joined in the same indictment when embraced in different counts.<sup>2</sup>

In Tweed's case there were two hundred and twenty counts in one indictment for misdemeanors, and a conviction upon fifty-five of them. The Court rendered a separate judgment and sentence upon each of these. After serving out one of them, he sued a *habeas corpus*, on the ground that all the judgments and sentences beyond the first were void, and the Court held them to be so, and discharged him. And a writer in 10 Am. Law Rev. 172, says: "It is a remarkable circumstance that throughout the whole of the judgment delivered in Tweed's case, no authority is referred to which furnishes the slightest support to the doctrine there announced." The language of Allen, J., is, "There is no real or true warrant in this State for several and distinct judgments upon a single individual indictment in the law."<sup>3</sup>

<sup>1</sup> Commonwealth v. Hills, 10 Cush. 534. So, in Connecticut. State v. Fuller, 34 Conn. 280; 1 Bish. Cr. Proc. § 451.

[It is settled law in Massachusetts that several offenses may be charged in the same indictment when they are of the same general nature, and when the mode of trial and the nature of the punishment are the same. Commonwealth v. Costello, 120 Mass. 358; Commonwealth v. Brown, 121; id. 82, and cases cited.]

<sup>2</sup> 1 Bish. Cr. Pro. § 452, and cases cited; O'Connell v. Queen. 11 Cl. & Fin. 155; Moore, C. L. § 801.

<sup>3</sup> People *ex rel.* Tweed v. Liscomb, 60 N. Y. 559, reported below in 3 Hun, 760; 6 N. Y. s. c. (T. & C.) 253.

[In relation to the decision in this case, Mr. Bishop says that,

If there are counts in an indictment which cannot be properly joined, the difficulty may be obviated by taking a verdict only on the counts that can be joined; or the prosecution may enter a *nol. pros.* after a verdict, as to any count in the indictment, and take judgment on the good counts. But a defective indictment cannot be cured by a verdict.<sup>1</sup>

At common law one cannot be convicted of a misdemeanor upon an indictment for a felony, [and this rule has been adopted in Pennsylvania, Indiana, Tennessee and Maryland. In New York, New Jersey, Vermont, Ohio, North Carolina, South Carolina and Arkansas the rule has not been adopted]. By statute in Massachusetts, [although before the statute it was held otherwise], this may be done, if the misdemeanor be substantially embraced in the original charge of felony.<sup>2</sup>

“In other localities (than New York), where the common law prevails, to accept it would be to overturn what is fundamental and established in authority, and in principle is essential to the just administration of the criminal law.” 3 South. Law Rev. (N. S.) 51. See, also, *Stack v. The People*, 80 Ill. 32; *Mullinix v. The People*, 76 id. 211; *Martin v. The People*, id. 499; *The People v. Whitson*, 74 id. 20; *Bolun v. People*, 73 id. 488.]

<sup>1</sup>1 Whart. C. L. § 418; *Commonwealth v. Tuck*, 20 Pick. 361, 366; 1 Bish. Cr. Proc. § 456; *Commonwealth v. Holmes*, 119 Mass. 198.

<sup>2</sup>*Commonwealth v. Roby*, 12 Pick. 506; 1 Whart. C. L. § 400; Gen. Stat. Mass. c. 172, § 16; *Commonwealth v. Drum*, 19 Pick. 480, upon a charge of rape, defendant may be convicted of an assault; *Commonwealth v. Squire*, 1 Met. 262, “feloniously” may be rejected as surplusage, and judgment rendered for misdemeanor.

*Joinder of Defendants.* In respect to joining two or more persons in the same indictment, it can rarely be made a ground of objection that one or more are omitted who were participators in the crime.<sup>1</sup> All who engage in doing a criminal act may be jointly indicted for the same in the same count, the test being whether each, if tried by himself, could be convicted of the crime charged.<sup>2</sup>

To charge two or more in the same indictment for a felony, they must have been present, aiding and abetting in the commission of the crime.<sup>3</sup> If two or more are present at the commission of a felony, where one does the act, such as killing a person, and they are indicted together, it is not necessary that the proof should sustain the allegations as to the one who did the act. If A did it, B and C assisting, it may be alleged that B did it, A and C assisting, since all are equally principals.<sup>4</sup>

If the offense charged be a misdemeanor, all who aided or promoted it, whether present at its commission or not, are principals, and may be indicted together jointly for the same.<sup>5</sup>

Not only may one of two defendants, jointly indicted, be acquitted, and the other convicted and judgment rendered thereon; but where the offense

<sup>1</sup> 1 Bish. Cr. Proc. § 463.

<sup>2</sup> 1 Bish. Cr. Proc. § 467; 1 Whart. C. L. § 429; 1 Chit. C. L. 267; 2 Hale, P. C. 173. See, also, Moore, C. L. § 816.

<sup>3</sup> Commonwealth v. Knapp, 9 Pick. 517.

<sup>4</sup> 1 Chit. C. L. 260; East, P. C. 350; 2 Hale, P. C. 185; 2 Bish. Cr. Proc. § 3; Coates v. The People, 72 Ill. 303.

<sup>5</sup> Commonwealth v. Drew, 3 Cush. 284; Commonwealth v. Ray, 3 Gray, 448.



charged contains within itself an offense of a lower grade, and two are indicted for committing it, one may be convicted of the higher, and the other of the lower, offense upon a joint trial.<sup>1</sup>

But of some offenses there can be no joint commission by two or more persons, such as perjury, common scold, common barrator, and the like, and of course two cannot, in such case, be jointly indicted for the same offense.<sup>2</sup>

So, there are some crimes where the offense is charged against several in the same count, and if a part be acquitted it is fatal as to the others. Thus, for example, it requires the concurrence of three,<sup>3</sup> at least, to constitute a riot, and if that or a larger number are indicted by name, and the proof fails as to all but two, it will work an acquittal of these. But if the indictment charge certain persons as having committed it with many other persons, and there is proof of a riot by more than three, and that the persons named were engaged in it, it will be sufficient, though only one be indicted.<sup>4</sup> But in these cases it is not necessary to join the rioters in one indictment; one may be arrested and tried before the others have been.<sup>5</sup>

<sup>1</sup> 1 Whart. C. L. § 434, 435; 1 Bish. Cr. Proc. § 1037; *Mask v. State*, 32 Miss. 405; 1 Chit. C. L. 270.

<sup>2</sup> 1 Chit. C. L. 268; 1 Bish. Cr. Proc. 470; Moore, C. L. § 817.

[<sup>3</sup> By statute in Illinois only two are required. Rev. Stat. 1874, 390, § 249.]

<sup>4</sup> 1 Bish. Cr. Pro. §§ 994, 998; *King v. Kinnersley*, 1 Strange, 196; *King v. Sudbury*, 12 Mod. 262.

<sup>5</sup> *King v. Kinnersley*, 1 Strange, 195; Moore, C. L. § 817.

*Accessories.* In charging a defendant with being an accessory, it is usual to include him in the same indictment as the principal, charging the principal in the first place in the same manner as if he were indicted alone, and then charging the accessory with aiding, abetting, etc., the principal in the commission of the offense, or with harboring him, etc., well knowing that the principal had committed the act. But it need not aver how this aid or harboring was rendered.<sup>1</sup> Or the accessory may be indicted separately from the principal.<sup>2</sup>

By the common law, an accessory could not be tried or convicted until the principal had been convicted. But now, both in England and Massachusetts, he may be indicted and tried before the principal, or where the principal has escaped and eluded justice; and in some of the States accessories are practically treated as principals in the matter of trial.<sup>3</sup> The same rule prevails in most of the States.<sup>4</sup>

As to the locality of the crime of being accessory and in what place he is to be tried, in England it is the county within which he did the act which renders him chargeable, or where the principal is to be tried. But in Massachusetts it is the county within which the principal is triable.<sup>5</sup>

<sup>1</sup> Chit. C. L. 272; 2 Hale, P. C. 222, 223; *Commonwealth v. Adams*, 7 Gray, 44; *Foster C. L.* 365.

<sup>2</sup> *Commonwealth v. Adams*, *sup.*

<sup>3</sup> *Roscoe Ev.* 206; *Commonwealth v. Andrews*, 3 Mass. 126; *Mass. Gen. Stat. c.* 168, § 4.

<sup>4</sup> 2 Bish. Cr. Proc. § 74, 13. See *ante*, p. —, note.

<sup>5</sup> Chit. C. L. 274; 1 Bish. Cr. Proc. §§ 57, 58; *Gen. St. c.* 168, § 5.

In the trial of an accessory, where the principal has been convicted, the record of his conviction is received as evidence of the crime charged, the *corpus delicti* having been committed, and that it was committed by the principal; and the burden of proving the contrary is thrown upon the defendant, although he was not a party in the trial of the principal. But he may impeach the judgment against the principal by proving either that the crime had not been committed, or that the principal was not guilty, in the collateral hearing in respect to his own guilt. The judgment in such case would be conclusive as to the principal, but not as to the party charged as accessory.<sup>1</sup>

By the common law the receiving of stolen goods was considered as a being accessory to the principal act of stealing, and it was only a misdemeanor, unless the receiver harbored the thief. But now it is made a substantive felony.<sup>2</sup> And the same is the law in Massachusetts and the United States generally.<sup>3</sup> In an indictment for the same, the charge is receiving the goods alleged to have been stolen, they having been "before then feloniously stolen," he, the defendant, "then and there well knowing the goods to have been feloniously stolen";

<sup>1</sup> 1 Chit. C. L. 273; 2 Bish Cr. Proc. § 12; Commonwealth v. Knapp, 10 Pick. 477, 484. But see King v. Turner, Moody, C. C. 349.

<sup>2</sup> 3 Chit. C. L. 953, 988; 2 Bish. C. L. (4th ed.) § 1092; 2 Bish. Cr. Proc. § 981.

<sup>3</sup> Gen. Stat. c. 161, § 43; 2 Bish. Cr. L. (4th ed.) § 1092.

it need not name the thief, but if named it must be proved as alleged.<sup>1</sup>

One may be charged in the same indictment by proper counts both as the principal thief and as a receiver of stolen goods.<sup>2</sup> The principal thief and the receiver may be joined in the same indictment, or indicted separately.<sup>3</sup>

*Indictments upon Statutes.* Great particularity is often required in framing indictments upon statutes, since, if the offense is created by statute the indictment must be drawn upon the statute with proper averments. If it be upon a public statute, it need not be recited, for the Court is assumed to know the terms of such statutes. But if it rests upon a private statute, it should be set out in the indictment. So that, if the facts recited in the indictment bring the charge within a public statute it will be sufficient; if these facts depend for this criminality upon a private statute, it must be set out as a part of the allegations in the indictment.<sup>4</sup>

If a statute punishes an offense by its legal signification, in drawing an indictment for it, it is sufficient to allege all the facts essential to constitute the crime; as when the statute punishes murder or burglary, it is sufficient to allege the facts

<sup>1</sup> 3 Chit. C. L. 959; *Commonwealth v. State*, 11 Gray, 63; *Commonwealth v. King*, 9 Cush. 287; *Rex v. Jervis*, 6 C. & P. 156.

<sup>2</sup> *Roscoe Ev.* 812.

<sup>3</sup> *Commonwealth v. Adams*, 7 Gray, 44; *Fost. C. L.* 365.

<sup>4</sup> 1 Chit. C. L. 277; *Whart. C. L.* §§ 365, 366; *Commonwealth v. Griffin*, 21 Pick. 525.

which constitute murder or burglary at common law.<sup>1</sup>

But if the statute describes the offense and what constitutes it, in charging its commission in an indictment it is sufficient to follow the words of the statute, because there is no occasion to allege anything more than what is charged by the words of the statute. Thus, in a prosecution under a statute prohibiting the "keeping a house of ill fame resorted to for the purpose of prostitution and lewdness," the words of the statute state the offense fully and with certainty; and in such cases the indictment only need to conclude "against the form of the statute in such case made and provided."<sup>2</sup> And as a general rule it is sufficient to describe an offense in an indictment in the words of the statute.<sup>3</sup> If it is necessary to refer to the statute to describe the offense intended to be charged, the defect is not supplied by alleging the act to be done *contra formam statuti*.<sup>4</sup>

If, in following the words of the statute, the in-

<sup>1</sup> *Tulley v. Commonwealth*, 4 Met. 358; 1 Chit. C. L. (Perk. ed.) 283, and note.

<sup>2</sup> *Commonwealth v. Ashley*, 2 Gray, 356; 1 Hawk. P. C. c. 25, § 111; 1 Chit. C. L. 281; *Tully v. Commonwealth*, 4 Met. 358; *Commonwealth v. Welsh*, 7 Gray, 327; *Commonwealth v. Hoyt*, 11 Gray, 463; *Commonwealth v. Harris*, 13 Allen, 539; Rev. Stat. Ill. 1874, 408, § 408; *Mohler v. The People*, 24 Ill. 26; *McCutcheon v. The People*, 69 id. 601; *Moore*, C. L. p. 36, note 5; *Warriner v. The People*, 74 Ill. 346; *Clemmer v. The People*, id. 361.

<sup>3</sup> *Hopkins v. Commonwealth*. 3 Met. 465; and note 2, *supra*.

<sup>4</sup> *Brown v. Commonwealth*, 8 Mass. 65.

dictment does not necessarily describe the offense intended to be created, it would be bad unless it is followed by an averment which makes the act charged an offense. Thus, breaking the glass in any building, if maliciously done in the building of another, is punishable by statute. But merely alleging that the defendant broke the glass, is not enough; for it might be true, and yet the glass form no part of the building, which is the offense intended by the statute.<sup>1</sup> So, the statute prohibits the knowingly or willfully digging up or removing a dead body; but as the reason was to prevent its being done for purposes of dissection, the indictment must allege the intention, to bring the act within the statute. Following the words of the statute would not be sufficient.<sup>2</sup>

One great test in all these cases is the one before stated:<sup>3</sup> if every allegation may be taken to be true, and yet the defendant be guilty of no offense, then it is insufficient, although in the very words of the statute.<sup>4</sup> Thus, charging a licensed inn-holder with suffering persons to play at cards in his house, is bad for not averring it to be a house kept by him as an inn-holder.<sup>5</sup> So, charging one with having in his possession paper designed for forgery or counterfeiting bank notes, which is the offense described

<sup>1</sup> *Commonwealth v. Bean*, 11 Cush. 414; *Commonwealth v. Bean*, 14 Gray, 54.

<sup>2</sup> *Commonwealth v. Stark*, 19 Pick, 306, 307.

<sup>3</sup> Page —.

<sup>4</sup> *Commonwealth v. Squire*, 1 Met. 258; *Commonwealth v. Harris*, 13 Allen, 539; *Commonwealth v. Tuck*, 20 Pick. 363.

<sup>5</sup> *Commonwealth v. Bolkom*, 3 Pick. 123.

in the statute, is bad for not averring the intent with which he had it.<sup>1</sup>

Where, in describing an offense created by statute, it makes use of technical terms, it is necessary to follow these in framing an indictment for the offense. But in general it will be sufficient to set forth the offense with substantial certainty.<sup>2</sup>

Another example of its being insufficient in some cases in drawing an indictment to follow the terms of the statute, is in charging the defendant with presuming to be a retailer or seller of spirituous liquors, which is substantially the language of the statute. It must state how, when, where and the one to whom the sale was made, if known, or aver him to be unknown, if such be the case.<sup>3</sup> But when the crime consists of a series of acts which make one crime, as being a common barrator or common seller of liquors, they need not be specially described.<sup>4</sup>

Where in creating an offense, a statute contains provisos and exceptions by which in a certain condition of things certain persons are exempted from the effect of the statute, an important distinction prevails as to the need of referring to this

<sup>1</sup> *Commonwealth v. Morse*, 2 Mass. 130.

<sup>2</sup> 1 Chitty, C. L. (Perk. ed.) 283, and note; *United States v. Batchelder*, 2 Gall. 15; *Josslyn v. Commonwealth*, 6 Met. 239.

<sup>3</sup> *Commonwealth v. Thurber*, 24 Pick. 374; *State v. Allen*, 32 Iowa, 491. See, however, *contra*, *Wrocklege v. The State*, 1 Iowa, 168; *Carmady v. The People*, 17 Ill. 159; *Myers v. The People*, 67 Ill. 504; *State v. Bielby*, 21 Wisc. 204; *State v. Gummer*; 22 id. 441.

<sup>4</sup> *Commonwealth v. Pray*, 13 Pick. 362.

clause of exemption in framing an indictment for the offense, growing out of the place in the statute in which it is found. If it is contained in the same section with the enacting clause, as, for example, prohibiting the selling of liquor to any person not a traveler or lodger, it is necessary in charging the offense to allege whatever is necessary to constitute it, and then negative that the person to whom sold was a lodger or traveler. If, however, the clause excepting the cases when, or the persons to whom, the enacting clause does not apply, is contained in a separate section, the indictment need not notice this. If a party who violates the enacting clause of the statute relies upon the exception as a justification or excuse, it is for him to set it up by way of defense.<sup>1</sup> [But when the exception is not stated in the enacting clause, otherwise than by merely referring to other provisions of the statute, it need not be negatived, unless necessary to a complete definition of the offense.]<sup>2</sup>

In the absence of some statute to the contrary, it is necessary in framing an indictment for an offense which is created by statute, to allege that the matter charged is against the statute in such cases made and provided, *contra formam statuti*. And formerly, if the indictment contained that averment,

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 284, and note; Commonwealth v. Maxwell, 2 Pick. 141; Commonwealth v. Jennings, 121 Mass. 49; Commonwealth v. Tuck, 20 Pick. 362; Chicago, B. & Q. R. Co. v. Carter, 20 Ill. 390; Metzker v. The People, 14 id. 101; Lequat v. The People, 11 id. 330; Lynch v. The People, 16 Mich. 476.

<sup>2</sup> Commonwealth v. Jennings, 121 Mass. 47.



and it turned out that the indictment contained a good charge for an offense at common law, but was not declared to be such by any statute, it was bad, the proof not following the averment.<sup>1</sup> But now both in England and this country, the averment in such a case may be rejected as surplusage and judgment be rendered as at common law. And in Massachusetts no objection can be made to the want of such averment in any indictment; and the same is true in some other of the States, though in most of them, as in England, if the offense is one strictly against a statute, it must be so alleged.<sup>2</sup>

If the indictment charges a crime with sufficient fullness and accuracy, but gives to it in the conclusion a name that is technically wrong, it would still be a sufficient indictment.<sup>3</sup>

*Matters of Description and Surplusage.* If an indictment, in setting out or describing a substantive part of a criminal charge, contains allegations which might have been omitted, it will still be necessary to prove them as alleged, or the indictment will fail; as for example, when the indictment alleges the larceny of a black horse and the proof shows the taking of a white one, or fails to prove a black one, when no allegation as to color was necessary. Such an allegation, if made, cannot be re-

[<sup>1</sup> *Town of Paris v. The People*, 27 Ill. 74. Mr. Bishop lays down the contrary doctrine. 1 Bish. Cr. Proc. § 601.]

<sup>2</sup> 1 Chitty, C. L. (Perk. ed.) 289, 290, note; 1 Bish. Cr. Proc. § 602, *et seq.*; Mass. Gen. St. c. 172, § 19; 2 Mich. Comp. Laws, 1871, § 7912; Moore, C. L. p. 37, notes.

<sup>3</sup> *United States v. Elliott*, 3 Mason, 156.

garded as surplusage.<sup>1</sup> But if the allegations are of matters which are not descriptive of the fact or degree of the crime nor material to the jurisdiction of the court, but are wholly disconnected with the circumstances which constitute the stated crime, they need not be proved and will be regarded as surplusage.<sup>2</sup>

*Amendments.* If indictments are defective, they are not amendable, except by some express statute; and where a capital indictment was defective but the defendant expressed a willingness to have it amended, the court refused to allow it to be done.<sup>3</sup> In this respect indictments are unlike informations, which are always amendable.<sup>4</sup>

*How one indicted is held to answer—Forfeiture of Recognizance.* While anything like a complete exposition of the requisite elements of indictments in their application to the different crimes of which the law takes cognizance, would transcend the limits of an elementary work like the present, the attempt has been made to furnish an outline of the leading principles which are recognized by the courts in framing indictments, leaving the details of form to

<sup>1</sup> *Commonwealth v. Atwood*, 11 Mass. 94; 1 Bish. Cr. Proc. §§ 485, 486; 1 Greenl. Ev. § 65; *Rickets v. Solway*, 2 B. & Ald. 360; *State v. Noble*, 15 Maine, 477.

<sup>2</sup> 1 Chit. C. L. (Perk. ed.) 295, and note; 1 Greenl. Ev. § 65

<sup>3</sup> *Commonwealth v. Mahon*, 16 Pick. 120. See 1 Bish. Cr. Proc. § 711, as to what States allow amendments. [Amendments in criminal cases are excepted out of the operation of the statute of amendments and jeofails. *The People v. Whitson*, 74 Ill. 23.]

<sup>4</sup> 1 Chit. C. L. 847; 1 Bish. Cr. Proc. § 714.

be supplied by a reference to any of the numerous standard treatises upon criminal procedure.

The next stage of inquiry, therefore, is obviously by what means one who has been charged by the indictment of a grand jury with the commission of a crime, may be held to answer to the same, preparatory to a trial by which his guilt or innocence of the charge is to be established.

If the party so charged is already in prison by virtue of a commitment by a magistrate, as has heretofore been explained, he is usually brought into court at once upon the indictment being filed, and arraigned and required to plead to it. If this plea be "guilty," the court usually proceeds to pass judgment and sentence upon him at once, unless there is some good cause for delay. If the plea be "not guilty," it is followed in due time by a trial of the issue by jury.

If instead of being in prison the party indicted is at large upon bail, he will, if he complies with the condition of his recognizance, be present in court and ready to plead to the indictment, when he will either be allowed to go at large upon a new recognizance to await his trial, or be committed until that shall take place.

The custom, therefore, is to have the party who has thus recognized, called by some officer in open court to appear and answer to the indictment, and if he do not appear and answer, he is called and defaulted, as it is called, and thereupon his surety or sureties in his recognizance, are called to bring the body of the principal into court; and if they fail

so to do, the recognizance is forfeited, and the parties to it are liable for the penalty incurred thereby, in an action of debt, or a proceeding in court called a *scire facias*, which is sued out by the prosecuting officer, and is a civil action in the name of the Commonwealth.<sup>1</sup>

Sometimes the prosecution is content to enforce the forfeiture of the recognizance and proceed no further. But such payment and satisfaction are no discharge of the liability of the principal for the crime, and he may be arrested upon a *capias* issuing from the court, and brought in and compelled to answer as upon an original proceeding.<sup>2</sup>

*Remedy of the Bail.* Until the principal in a recognizance has been defaulted in the manner above stated, he is in theory of law in the custody of his bail or sureties in his recognizance, who may seize him at any time, by night or by day, or on the Sabbath, and may for that purpose break the doors of the principal's house and commit him to the same jail to which he would have been committed if he had not obtained bail.<sup>3</sup> This could not be done in Massachusetts after the forfeiture of the recognizance, until provision for its being done was made by statute. And now the bail may surrender

<sup>1</sup> *Commonwealth v. McNeill*, 19 Pick. 138; *Commonwealth v. Stebbins*, 4 Gray, 26. See Rev. Stat. Ill. 1874, 397, § 310.

<sup>2</sup> *Petersdorf on Bail*, 516.

<sup>3</sup> *Nicolls v. Ingersol*, 7 John. 145, 155, 156; *Commonwealth v. Brickett*, 8 Pick. 138; *Brown v. The People*, 26 Ill. 31; 1 Chit. C. L. 104; *Moore, C. L.* §§ 119, 120; *Petersdorf on Bail*, 514; *Mass. Stat.* 1863, c. 59; 1 Bish. Cr. Proc. §§ 249, 250, note.

his principal at any time before the commencement of an action of *scire facias* on the recognizance, to the jailor in the county in which the crime was committed, by delivering with him a certified copy of the recognizance, in which case the principal shall be retained by the jailor with a right to furnish new bail. Or the bail may surrender their principal in court at any time before final judgment in an action of *scire facias* upon the recognizance.<sup>1</sup>

*Capias.* If the proceedings against a party indicted be commenced by a complaint before the grand jury; or if, being under recognizance, he fails to appear at court, the next step in the process is the issuing of a *capias*, or writ from the court, bearing that name, directed to a proper officer, commanding him to arrest the person charged in the indictment, and bring him before the court to answer to the indictment, if in session, or commit him to jail. This the officer serves by arresting the person named in the warrant, and if the court is not in session, committing him to the jail, unless he is prepared to recognize for his appearance at court, in which case the officer takes him before the proper magistrate, where he enters into such recognizance, and is discharged from custody, and the officer makes return of his doings thereon, together with a certificate of the magistrate of his having taken such recognizance and the recognizance thus taken.<sup>2</sup>

<sup>1</sup> *Commonwealth v. Johnson*, 3 Cush. 454; Gen. Stat. Mass. c. 170, §§ 41, 42; Stat. 1863, c. 59.

<sup>2</sup> Cro. Cir. Comp. 9, 15; 1 Chit. C. L. 339, 346, 347; Mass. Gen. St. c. 170, §§ 11, 12. See Rev. Stat. Ill. 409, § 415.

*Arrest.* What constitutes an arrest, and how and under what circumstances it may be made, present some of the most important and difficult questions which arise in determining what may be done under the forms of criminal proceedings, since from the jealous care of the law in protecting the person and households of its subjects, any unwarranted invasion of either of these, though done under the forms of law, is visited with severe and exemplary penalties.

The first inquiry is, when, how and by whom an arrest may be made without a formal warrant or precept?

In the first place, an arrest is the seizing or detaining the person of another in custody, and this is usually done by laying a hand upon his person for that purpose, or having him within one's power, as being with him in a room and locking the door, declaring that he arrests him; or it may be done by the party voluntarily consenting to be held under arrest.<sup>1</sup> One reason for ascertaining what constitutes an arrest is its bearing upon questions of alleged escape, and the right of recapture when such arrest has actually been made, even by the breaking of doors. Mere words cannot amount to an arrest.<sup>2</sup>

If one sees another commit a felony, or about committing a felony, he may arrest him without a warrant, and hold him, or give him into the

<sup>1</sup> 1 Bish. Cr. Proc. § 157; *Grainger v. Hill*, 4 Bing. N. C. 212; *Mowry v. Chase*, 100 Mass. 85; 4 Black. Com. 289; Dane's Abr. c. 65, art. 2.

<sup>2</sup> Dane's Abr. c. 65, art. 2.

custody of an officer, to prevent his escape or his commission of the crime, until he can be brought before a magistrate who has cognizance of the offense. But this does not extend to cases of mere misdemeanor.<sup>1</sup> And this, though to do so he has to break the door of a dwelling house, and even, in some cases, to take life.<sup>2</sup>

So, if one knows that another has committed a felony, he may arrest him without a warrant, and, if necessary, call upon others to assist him, and deliver him into the custody of an officer, or bring him before the proper magistrate.<sup>3</sup> So, if a felony has been committed, and one have reasonable cause to suspect that another has committed it, he may arrest him as is above stated. But in this he acts upon his peril, for if there has been no felony committed, he will not be justified in making the arrest. Nor can he justify breaking doors to make arrest

<sup>1</sup> 4 Cooley's Black. 292-3, and note; *Handcock v. Baker*, 2 B. & P. 262, 265; 1 Chit. C. L. 15; *Kindred v. Stitt*, 51 Ill. 407.

[By statute in Illinois, (Rev. Stat. 1874, p. 400, § 342), "an arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed or attempted in his presence, and by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it." It is held in that State that a private person may arrest one committing a misdemeanor, without suing out a warrant or calling an officer. *Smith v. Donnelly*, 66 Ill. 464. See, also, *Moore*, C. L. § 62; *Dodds v. Board*, 43 Ill. 95; *Marsh v. Smith*, 49 Ill. 396; *Kindred v. Stitt*, *supra*.]

<sup>2</sup> *Ib*; *Ib*; 2 Hale, P. C. 77.

<sup>3</sup> 2 Hale, P. C. 76; 1 Chit. C. L. 13.

[See, however, as to the rule in Illinois, the authorities cited in note, *supra*.]

upon probable suspicion.<sup>1</sup> The law upon this point is thus stated by the Massachusetts Court: "As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of actual guilt of the party arrested, and the arrest can only be justified by proving such guilt." But if a felony has been committed, an arrest may be made without a warrant.<sup>2</sup> This, it will be perceived, greatly limits the right of private arrest from that stated by Hale, as above stated, and restricts it to cases of actual guilt, though the point was not raised in the case. Other American authorities seem to sustain the broader doctrine.<sup>3</sup>

This power in a private person to arrest does not extend to the cases of a mere breach of the peace "after it is over."<sup>4</sup>

The extent of the authority of peace officers to make arrests without warrants is much broader than that of individuals, while it includes the cases in which the latter may make them. In the language of the case above referred to,<sup>5</sup> "they are held to be justified, if they act in making the arrest upon probable and reasonable grounds for believing the party guilty of a felony." And whether there was a rea-

<sup>1</sup> 2 Hale, P. C. 78; 1 Chit. C. L. 15; 4 Cooley's Black. 293, note. See note 1, p. 175.

<sup>2</sup> Rohan v. Sawin, 5 Cush. 285; Commonwealth v. Carey, 12 Cush. 251; Commonwealth v. Lee, 107 Mass. 207.

<sup>3</sup> 1 Bish. Cr. Proc. § 168, 181; 1 Chit. C. L. 15; Holley v. Mix, 3 Wend. 350; Wakely v. Hart, 6 Binn. 316.

<sup>4</sup> Phillips v. Trull, 11 John, 487; 1 Chit. C. L. 15.

<sup>5</sup> 5 Cush. 285.



sonable necessity for making the arrest to prevent the escape of the party charged with the felony, seems to be a matter within the officer's discretion, acting upon his official responsibility.<sup>1</sup>

But a peace officer cannot arrest one without a warrant, who is only suspected of having committed a crime not a felony.<sup>2</sup> If, however, a peace officer see a party committing a breach of the peace, he may arrest him and hold him until he can make complaint and have him arrested upon a warrant ; and this by statute is extended to justices of the peace, or any person whom the justice may require to arrest such offender and bring him before such justice.<sup>3</sup>

Many of the propositions which have been treated of to some extent above, are considered by the court of Pennsylvania in a case cited below, in which the Court say: "That on the commission of a felony a private person making fresh pursuit on reliable information may arrest the felon, is the law not only of England but of this State ;" "upon probable suspicion, also, a private person may arrest the felon or other person so suspected. But upon suspicion of felony only, he may not break open a house or kill the suspected person." "If a felony has in

<sup>1</sup> 1 Bish. Cr. Pro. §§ 173, 181; *Commonwealth v. McLaughlin*, 12 Cush. 618; 1 Chit. C. L. 15.

[See note 1, p. 175, *ante*, as to the rule in Illinois.]

<sup>2</sup> *Commonwealth v. McLaughlin, sup*; *Commonwealth v. Carey, sup*; 1 Bish. Cr. Proc. §§ 181, 183.

<sup>3</sup> 1 Bish. Cr. Proc. § 183; Mass. Gen. Stat. c. 120, § 32, c. 163, § 17; *Commonwealth v. McGahey*, 11 Gray, 196. See, also, Rev. Stat. Ill. 1874, 400, § 343.

fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not." "But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified, if he acted upon information from another which he had reason to rely on." "Even when there is only probable cause of suspicion, a private person may without warrant, at his peril, make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest." <sup>1</sup>

Where arrests have been made without a warrant, as above stated, the purpose is to detain the party in custody until a complaint can be made to a proper magistrate, and a warrant issued thereon, by which he may be arrested and held to answer to the same, as upon an original proceeding. And this must be done without unreasonable delay after such first arrest has been made. If made by a private person, it is the safer course to have the party arrested brought as soon as convenient before a magistrate for examination, though he may be delivered into the hands of an officer, or committed to jail for safe keeping.<sup>2</sup>

In entering upon the examination of how, and in what cases arrests may be made under legal process,

<sup>1</sup> *Brooks v. Commonwealth*, 61 Penn. St. 358, citing *Holly v. Mix*, 3 Wend. 353.

<sup>2</sup> 2 Hale, P. C. 76, 77; 1 Chit. C. L. 59; Dane's Abr. c. 172, art. 9, § 23; 4 Cooley's Black. 295, and note; Mass. St. 1869. c. 415, § 42; *Commonwealth v. Tobin*, 108 Mass. 429.

it may be generally stated that any officer duly qualified to act as such, may execute a warrant according to the precept thereof, which is in proper form, and has been issued by a court or magistrate having jurisdiction of the subject matter of it. "As a general rule an officer is bound only to see that the process which he is called upon to execute, is in due and regular form, and issues from a court having jurisdiction of the subject." "It is not for him to inquire into the regularity of the proceedings of the court that issued the warrant."<sup>1</sup> But if the defect appears upon the face of the warrant, the officer is not bound to serve it, and if he does, he is a trespasser.<sup>2</sup>

The importance of this is illustrated in the character it gives to the act of killing an officer while serving a process, such killing being done in resisting service, by the party against whom the process is issued. If it be a valid warrant, served by a qualified officer, such killing would be murder. But if the arrest was unlawful, or the process defective in the form of it, or invalid on the face of it, or issued with an insufficient description of the defendant, or against the wrong person, or if the party have no knowledge of the officer's business, the killing would be reduced to the crime of manslaughter. And one may resist being arrested upon a void warrant, by using so much force as is necessary, and an outsider may assist him so far as is necessary.<sup>3</sup>

<sup>1</sup> *Wilmarth v. Burt*, 7 Met. 259; *Donahoe v. Shed*, 8 Met. 328.

<sup>2</sup> *Pearce v. Atwood*, 13 Mass. 244.

<sup>3</sup> *Commonwealth v. McLaughlin*, 12 Cush. 618; *Rafferty v.*

This leads to the inquiry, how far it is necessary such the officer in making the arrest should make known to the person arrested the authority by which, and the purpose for which it is made, by showing his precept. The language of the statute of Massachusetts upon the subject would, it is believed, be accepted as the law generally in this country: "Every person arrested by virtue of process, or taken into custody by an officer in this State, has a right to know from the officer who arrests or claims to detain him, the true ground on which the arrest is made; and an officer who refuses to answer a question relative to the reason for such arrest, or answers such questions untruly, or assigns to the person arrested an untrue reason for the arrest, or neglects on request to exhibit to the person arrested, or any other person acting in his behalf, the precept by virtue of which such arrest is made, shall be punished," etc. And in applying this rule, it has been held that if the officer tells the party that he arrests him by a warrant, and he thereupon resists, or attempts to make escape, so that the officer has not a reasonable opportunity to exhibit his warrant, he is in no fault for not exhibiting it. He is not bound to do so till he has the party in safe custody.<sup>1</sup>

Warrants for any alleged crime may be issued and served on the Sabbath, except for the violation

People, 69 Ill. 111; s. c. 72 Ill. 37; 1 Chit. C. L. 44; Commonwealth v. Crotty, 10 Allen, 403.

<sup>1</sup> Gen. Stat. Mass. c. 158, § 1; Commonwealth v. Cooley, 6 Gray, 356; Commonwealth v. Field, 13 Mass. 323; 1 Chit. C. L. 51; Hawks P. C. b. 2, c. 13, § 28; Hall v. Roche, 8 Term, 188. See 1 Bish. Cr. Proc. §§ 190, 191; Moore, C. L. § 56.

of the Lord's day.<sup>1</sup> So they may be served in the night time, but in England, service upon the Sabbath is limited to the cases of treason, felony and breach of the peace.<sup>2</sup>

In the service of a warrant the officer serving it may orally command the assistance of other persons, and an arrest made by his assistants will be valid, though the officer retain the warrant and is not in sight at the time of its service, provided both he and his assistant are at the time engaged in the business of making the arrest; it is the act of the officer in the eye of the law.<sup>3</sup> And if one who is commanded by an officer to aid in securing a criminal or keeping the peace, refuse or neglect so to do, he is liable to punishment therefor as a criminal act.<sup>4</sup>

An interesting inquiry remains to be settled as to what length an officer may go in arresting a party named in a warrant which he may have in his hands, in the matter of breaking doors or taking life.

In the first place, no man's house is a sanctuary for anybody but himself and family.<sup>5</sup> But where an officer breaks into another's house to arrest a

<sup>1</sup> *Pearce v. Atwood*, 13 Mass. 347, 353. See 1 Bish. Cr. Proc. § 207; Rev. Stat. Ill. 1874, 401, § 344.

<sup>2</sup> 1 Chit. C. L. 49, 343.

[In Illinois "an arrest may be made on any day, or at any time of the day or night." Rev. Stat. 1874, 401, § 344.]

<sup>3</sup> *Blatch v. Archer*, Comp. 63; *Commonwealth v. Field*, 13 Mass. 323; *Moore*, C. L. § 59.

<sup>4</sup> Mass. Gen. St. c. 163, § 16; Rev. Stat. Ill. 1874, 389, § 245.

<sup>5</sup> *Fost. C. L.* 320; *Emerson v. Balch*, 2 Dane Abr. 651; 1 Chit. C. L. 57.

felon, he must demand admission and give notice of the cause of such demand before breaking the door, and even then he does it at his peril; for if the felon is not within the house, he would be a trespasser, though it is held in Massachusetts that he would be justified if he had reasonable grounds to believe he was in the house.<sup>1</sup>

Nor is it a sanctuary from being broken by an officer who has a warrant to arrest the owner for a breach of the peace or a felony, if before breaking the door he demand an entrance, and make known that he has such warrant and is refused admission. Nor would the officer be liable for breaking the doors in such case, if the party against whom the warrant ran were not in the house, if the officer acted *bona fide* under belief he was in it.<sup>2</sup> Chitty sustains the doctrine as stated by Foster, but doubts the authority to break doors to arrest for a mere misdemeanor not accompanied with violence.<sup>3</sup> But the doctrine as laid down by Hawkins, extends the right of breaking doors, "upon a *capias* grounded on an indictment for any crime whatsoever," "or even upon a warrant from a justice of peace," "to compel a man to find sureties for the peace or good behavior." And this is sustained by Chitty himself in cases of arrest upon an indictment.<sup>4</sup>

<sup>1</sup> 2 Hale, P. C. 117; Commonwealth v. Irwin, 1 Allen, 589.

<sup>2</sup> Foster C. L. 136, 320; Hawk. P. C. b. 2 ch. 14, §§ 1-3; 2 Hale P. C. 117; State v. Smith, 1 N. H. 346; Allen v. Martin, 10 Wend. 300; Barnard v. Bartlett, 10 Cush. 503.

<sup>3</sup> 1 Chit. C. L. 55.

<sup>4</sup> Hawk. P. C. b. 2, c. 14, § 3; 1 Chitty C. L. 58; Moore C. L. § 55. [Mr. Bishop lays down the rule in the same terms as

Hawkins also mentions as among the cases where doors may be broken after a demand of entrance, and notice to the parties within the house, of the cause why it is made, where one known to have committed treason or felony or to have given another a dangerous wound, is pursued either with or without a warrant by a constable or private person, and wherever a person is lawfully arrested for any cause, and afterwards escapes and shelters himself in a house, either his own or another's.<sup>1</sup>

A constable may, without a warrant, enter a house whose doors are not fastened, in which there is a noise amounting to a breach of the peace, to arrest any person engaged in an affray, or in committing an assault.<sup>2</sup>

The proposition seems to be true in all cases, that if an officer has once rightfully entered an outer door and finds an inner one fastened, he may, after demanding admission and making known the cause, break it open. And some of the cases hold that it may be done without making any demand of entry.<sup>3</sup>

Chitty, "that in all cases," [as well before as after indictment,] "doors may be broken open, if the offender cannot be otherwise taken, under warrant for treason, felony, suspicion of felony, or actual breach of the peace, or to search for stolen goods." 1 Bish. Crim. Proc. § 200. He states, however, (ib. § 201,) that there seems no well founded authority for the extension of the right to misdemeanors unaccompanied by violence.]

<sup>1</sup> Hawk. P. C. b. 2. c. 14, §§ 7, 9; 1 Hale P. C. 459, 588; 4 Black. Com. 288; 1 Chit. C. L. 58, 61; *Allen v. Martin, sup.*; *Commonwealth v. McGahey*, 11 Gray, 194.

<sup>2</sup> *Commonwealth v. Tobin*, 108 Mass. 429.

<sup>3</sup> 1 Chitty, C. L. 59; 1 Hale, P. C. 458; *Radcliff v. Barton*, 3 B. & P. 223; *Hubbard v. Mace*, 17 John. 127; *Hutchinson v.*

In *Lee v. Gansel*, the question was made if the doctrine applied to the case of a lodger who occupies a room in another's house, and whether his private door is not as to him an outside door, as would be the case with rooms occupied by a tenant in such a building as an inn of court having a common outer door and passage way for access to all. And it was held that in the case of a lodger this latter doctrine would not apply.

A graver question has often arisen, whether and how far an officer in attempting to make an arrest, is justified in taking the life of the party who resists or attempts to escape? East thus states the law upon this subject: "If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable. This rule is not confined to those who are present so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for if in these cases fresh suit be made and *a fortiori* of hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. The same rule holds if a felon, after arrest, break away as he is being carried to gaol, and his pursuers cannot retake without killing him."<sup>1</sup>

*Birch*, 4 Taunt. 618, qualifying the necessity of demanding admission; *Williams v. Spencer*, 5 John. 352, to the same effect. So, *Lee v. Gansel*, Cowp. 1, 7.

<sup>1</sup>East, C. L. 298; 1 Bish. Cr. Proc. § 159; 4 Black. 180;



Judge Cooley, in his note to 4 Black. 180, says : "If an officer has a warrant against A, *by name*, for felony, or if A be indicted of felony, if A, though innocent, flies or resists, and is killed by the officer or any other person aiding him, during flight or resistance, the person so killing him is indemnified. And the officer, it seems, would be equally indemnified, though he had no warrant, if he acted on a charge of felony, and on reasonable suspicion, even though it should appear in the result that no felony had been committed."<sup>1</sup>

But no one can arrest another *without a warrant*, and, in order to prevent his escape, take his life, unless he *knows* and can prove he has been guilty of the felony for which he had arrested him. But if one attempt to arrest another without a warrant for a *misdemeanor*, and he attempts to escape, he may not take life to prevent it.<sup>2</sup>

*Requisitions—Extradition.* It not unfrequently happens that the person to be arrested is without the jurisdiction of the courts of the State in which the offense was committed, but within some other of the States of the Union, and the question is, how can he be reached and brought within cognizance of the court that is to try him? This is provided for in the Constitution of the United States

Hawk. P. C., b. 1, ch. 28, § 11; 1 Hale, P. C. 488, 489, 490, 587; 2 Hale, P. C. 77; 2 Whart. C. L. § 1031.

<sup>1</sup> 1 Russ. C. 666; 1 Bish. Cr. Proc. § 160; 12 Alb. L. Jour. 245.

<sup>2</sup> *Conraddy v. People*, 5 Park. Cr. Rep. 235; 1 Bish. Cr. Proc. § 159; Moore, C. L. § 58.

in these words : " A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." <sup>1</sup>

The manner in which the provision is carried into effect is substantially as follows : Upon an application to the executive of a State in which the offense has been committed, with proper evidence of the pendency of a criminal charge against a person, accompanied by satisfactory evidence that he is within another State, a warrant is issued under the seal of the Commonwealth and the signature of the executive, authorizing some person therein named to proceed to the State named and receive the person charged and bring him to the State in which he is to be tried, and with this a requisition addressed to the executive of the State in which he is expected to be found, setting forth the facts and copies of the proceedings under which he is to be tried, requesting him to issue a proper warrant to arrest the person charged, and to have him delivered to the agent who has been appointed to receive and remove him to the State in which he may be tried. If the executive addressed complies with this requisition, he issues a warrant to some proper officer to arrest the person charged and deliver him to the agent of the executive making the requisition, who receives him and brings him back and surrenders

<sup>1</sup> Art. 4, Sec. 2.

him into the custody of the proper officers, to meet his trial.<sup>1</sup>

It was sharply discussed for many years, for what offenses these requisitions might be made, as being within the category of "other crimes."<sup>2</sup>

In *Commonwealth of Kentucky v. Dennison*, 24 How. 66, the Court held that it extended to every crime forbidden by the law of the State where the offense was committed, and that the Governor of the State on whom the requisition is made has no discretionary power to refuse to obey it. But it practically relieves him from being an involuntary catchpole to gratify a prosecutor in some distant State, if upon inquiry he finds such to be the case, by holding that there is no mode known to the law of coercing the Governor of a State to execute such a power.

The matter of reaching persons charged in any of these States who are within the jurisdiction of a foreign government, depends upon treaties between the United States and such government, which prescribe for what crimes extradition shall be made.<sup>3</sup>

*Right of prisoner to a copy of indictment and assistance of counsel.* If it is assumed that in any of the modes above mentioned a party charged with a crime is arrested, preparatory to a trial thereon a question arises, what are his rights and privileges in

<sup>1</sup> See Rev. Stat. Ill. 1874, p. 545.

<sup>2</sup> 24 Am. Jur. 226-231.

<sup>3</sup> *Holmes v. Jennison*, 14 Peters, 540; *Ex parte Holmes*, 12 Verm. 630.

preparing for his defense? In this respect the law of England has been greatly ameliorated of late compared with its former strigency, and many improvements have been introduced into our system of criminal procedure, upon that in use in England.

By the common law one charged with treason or felony had no right to a copy of the indictment, although in Latin, except by special favor of the court. Nor can such copy be claimed of right now, except for offenses less than a felony, though generally granted upon request; whereas, in this country it is a right secured by the constitutions or statutes of the States.<sup>1</sup> In Massachusetts if the grand jury return an indictment for a capital offense, a copy of it is served upon the party indicted as soon as may be, if he is in custody. And if he is indicted for an offense punishable by imprisonment in the State's prison, he is entitled to a copy of it with all the indorsements thereon, free of charge.<sup>2</sup>

Not only is such a copy valuable to the prisoner in informing him of the nature of the charges which he is to answer, but it is often indispensable, if he intends to plead a former acquittal or conviction of the same offense with which he is now charged.

When upon his arraignment for high treason, Algernon Sidney desired a copy of the indictment,

<sup>1</sup> 4 Cooley's Black. 352, and note; 1 Chit. C. L. 175, 403, and Perkins' note; Eden Pen. Laws, 183; Rev. Stat. Ill. 1874, 409, § 421; Moore, C. L. §§ 832, 835. See *McKinney v. The People*, 2 Gilm. 540; *Yundt v. The People*, 65 Ill. 374.

<sup>2</sup> Gen. St. c. 171, §§ 22, 25.

the Chief Justice of the Court answered: "We cannot grant it by law." He then said: "I desire you would please to give me counsel," to which the Chief Justice replied: "We cannot do it; if you assign us any particular point of law, if the Court think it such a point as may be worth debating, you shall have counsel. But if you ask for counsel for no other reason than because you ask it, we must not grant it."<sup>1</sup>

In this country the right to employ counsel is guaranteed to every man charged with crime.<sup>2</sup> And the Court may, and practically always do assign counsel to aid a person charged with a capital case in conducting his trial.<sup>3</sup> It was always competent to employ the aid of counsel in the trial of any offense less than felony in England, and the privilege is now extended to all classes of offenses.<sup>4</sup>

*Right to call Witnesses.* Another privilege of persons charged with felonies or other offenses, is now enjoyed both in England and this country, though denied by the common law in case of felonies, namely, that of calling witnesses in their behalf, and having them examined upon their trial upon oath.<sup>5</sup>

<sup>1</sup> 3 Hargrave's State Trials, 796.

<sup>2</sup> U. S. Const. 6th Amendt.; Const. Ill. 1870, Act 2, § 9; Mass. Bill of Rights, Art. 12; Mass. Gen. Stat. c. 158, § 4; 4 Am. Jur. 18; Cooley's Const. Lim. 334.

<sup>3</sup> Mass. Gen. Stat. c. 112, § 9; Rev. Stat. Ill. 1874, 410, § 422; 4 Black. 355, and Cooley's note.

<sup>4</sup> Chit. C. L. 409; 6 and 7 Wm. IV. c. 114; Cooley's Const. Lim. 332; 4 Cooley's Black. 355; May's Const. Hist. c. 18.

<sup>5</sup> 1 Chit. C. L. 615; Gen. St. Mass. c. 170, § 21. See Const. of Ill. 1870, art. 2, § 9.

And if the crime charged in an indictment is punishable capitally or by imprisonment in State's prison, the defendant may have his witnesses summoned at the charge of the Commonwealth; and a like privilege is granted in England.<sup>1</sup> And if a witness for the defendant is out of this Commonwealth, the Court upon his application may, by provision of a statute, grant a commission for taking his testimony by deposition. But this is confined to application of defendants, inasmuch as every one charged with crime has a right to meet the witnesses against him face to face.<sup>2</sup>

*Presence of Accused.* No person charged with felony can be put upon trial in his absence; but, if the offense charged be a smaller offense, he may by leave of Court, upon his request, be put upon trial in his absence, by attorney.<sup>3</sup>

*List of Jurors and Witnesses.* Another privilege accorded to the accused, both in England and this country, if charged with a capital offense, is to have a list of the jurors furnished him from which the panel is to be made up, who are to try him, in order to enable him, by inquiry, to exercise his right of challenge intelligently, which right of chal-

<sup>1</sup> Gen. St. c. 171, § 24; Eden, Pen. Law, 154.

<sup>2</sup> Gen. St. Mass. c. 171, §§ 32, 33; Mass. Bill of Rights, art. 12; Const. Ill. 1870, art. 2, § 9; U. S. Const. 6th amend. See *Richardson v. The People*, 31 Ill. 173; *Nash v. State*, 2 G. Greene, 287; *Bergen v. The People*, 17 Ill. 426; Moore, C. L. § 881, *et seq.*

<sup>3</sup> Gen. Stat. c. 172, § 8. See 1 Chit. C. L. 411; 1 Bish. Cr. Proc. § 265, *et seq.*; Moore, C. L. §§ 932, 933.

lenge will hereafter be considered:<sup>1</sup> And in Massachusetts the accused party, in capital cases, has a right to be furnished with the names of the witnesses upon whose testimony the indictment against him was found. But it is limited to such as were examined before the grand jury.<sup>2</sup>

The custom once prevailed in the English courts, but is no longer tolerated, of putting in as evidence against the accused, the confessions and declarations of absent witnesses, though their personal attendance might be had.<sup>3</sup>

*Arraignment and Plea.* Recurring again to the arraignment of one who has been arrested and brought into court to answer to an indictment, upon the call of the clerk, he stands up and hears the indictment read to him, but is not required to hold up his hand except in a capital trial. He is then inquired of what he says to the indictment, guilty? or not guilty? If he wishes to interpose a dilatory plea, such as misnomer, and the like, he does it before answering generally, because by so

<sup>1</sup> 1 Chit. C. L. 404, and Perkin's note; Eden, Pen. Law, 153; Gen. St. c. 171, § 24.

[In Illinois "every person charged with treason, murder or other felonious crime, shall be furnished, previous to his arraignment, with a copy of the indictment, and a list of the jurors and witnesses. In all other cases he shall, at his request or the request of his counsel, be furnished with a copy of the indictment, and a list of the jurors and witnesses." Rev. Stat. 1874, 409, 421 ]

<sup>2</sup> Commonwealth v. Knapp, 9 Pick. 498; Commonwealth v. Locke, 14 Pick. 485; Commonwealth v. Walton, 17 Pick. 403. See, also, next note *supra* and Rev. Stat. Ill. 1874, 634, § 17.

<sup>3</sup> Eden, Pen. Law, 196; Shakespeare, Hen. VIII. Act. 2.

doing he waives these objections. So it is with a demurrer, if he wishes to offer one.<sup>1</sup>

A demurrer rests upon the ground that the matters as set forth in the indictment, are not sufficient to require the defendant to answer to the same, waiving the question of their being true, and this raises an issue which is tried and decided by the court. If decided in the defendant's favor, it stops the proceeding. If against him on the charge of a felony, the judgment usually is *respondeat ouster*. But as in most cases the objection raised by a demurrer may be taken by arrest of judgment, it is not generally expedient to take the objection in that way. The defendant is just as safe in going to issue upon the facts. If the issue is against him, he may arrest the judgment; if in his favor, it would be a bar to any further action.<sup>2</sup> If the offense charged be a misdemeanor, judgment upon demurrer against the defendant would be tantamount to an admission of the facts charged. But the courts may allow the defendant in such a case to withdraw his demurrer and plead to the indictment.<sup>3</sup>

A plea in abatement for misnomer, as well as a

<sup>1</sup> 1 Chit. C. L. 423, 435; *Commonwealth v. Merrill*, 8 Allen, 545; 1 Bish. Cr. Proc. § 756. There was a dilatory plea known to the common law, of "sanctuary," so-called, of which there is an account in 3 P. Wms. 38, note. But it never was adopted in this country, and was abolished in England in 1624. Jac. Law Dict. "*Sanctuary*."

<sup>2</sup> See, however, *post*, "Once in jeopardy."

<sup>3</sup> 1 Chit. C. L. 439-444; *Rex v. Gibson*, 8 East, 112; 1 Bish. Cr. Proc. §§ 754-755; *Commonwealth v. Merrill*, 8 Allen, 545; Moore, C. L. § 845. But see Hawk. P. C. b. 2, c. 31, § 7.



special plea in bar of *autrefois acquit* or *autrefois convict*, if denied by the prosecution, may raise issues of fact to be decided by the jury; and the judgment thereon may in cases of misdemeanor be final and conclusive, if against the defendant, but in cases of felony that he *respondeat ouster*. If in favor of the defendant, it defeats the prosecution. The plea [of former acquittal or conviction] may be *ore tenus*.<sup>1</sup>

If the defendant pleads a former conviction or acquittal and a plea of not guilty, the first issue must be tried by itself before that of not guilty, since they are distinct and independent pleas. The latter plea is not generally offered until the plea of former conviction or acquittal has been decided. Former acquittal or conviction should be specially pleaded and issue should be taken thereon in law or to the country.<sup>2</sup>

Formerly, when a party was arraigned upon a capital charge and had pleaded the general issue, the clerk inquired of him how he would be tried, to which he was accustomed to answer, "by God and the country," which was the same as by the jury. But as now there is no other mode of trying such an issue, that inquiry is not made, and when

<sup>1</sup> 1 Chit. C. L. 450, 452; *Commonwealth v. Merrill*, 8 Allen, 548; *Commonwealth v. Goddard*, 13 Mass. 460.

[See *State v. Farr*, 12 Rich. 24; *Rex v. Grainger*, 3 Burr. 1617, to the point that pleas in abatement must be in writing and verified by affidavit.]

<sup>2</sup> *Commonwealth v. Merrill*, 8 Allen, 546-548; *Commonwealth v. Dascom*, 111 Mass. 404. See Moore C. L. §§ 852, 854, 855.

the defendant to a criminal charge pleads not guilty, it is understood that he thereby puts himself upon the country or jury for trial.<sup>1</sup>

The course to be pursued if the defendant refuses to plead, or stands mute, has been already stated.<sup>2</sup> So have the precautions which courts take in cases of pleas of guilty in capital cases, to guard against unadvised action by the party charged. But the plea of guilty when accepted, is an admission of the truth of all the facts properly charged in the indictment.<sup>3</sup>

In addition to what has hereinbefore been stated as the rule of law in cases where the prisoner is deaf, it may be said that if there is no mode of holding communication with the party charged, so that he can understand the nature of the proceedings against him, the Court will suspend the proceedings or discharge the prisoner altogether.<sup>4</sup>

So, it may also be added that, though in strictness, if the verdict upon a plea in abatement is against the defendant, the judgment is conclusive, if it be a charge of misdemeanor, where the penalty which follows such a conviction is severe, it is customary with the Court to permit the defendant to

<sup>1</sup> 1 Chit. C. L. 416, 417, and Perkins' note; United States v. Gibert, 2 Sumner, 19; Gen. St. Mass. c. 171, § 29; Rev. Stat. Ill. 1874, 410, § 423.

<sup>2</sup> *Ante*, p. —

<sup>3</sup> Chit. C. L. 428. As to the effect of the plea of *nolo contendere*, see *ante*, p. —.

<sup>4</sup> Rex v. Berry, 34 Law Times, 591; Rex v. Dyson, 7 C. & P. 305; Rex v. Pritchard, 7 C. & P. 303; 14 Alb. L. Jour. 198, 207.

replead and go to issue upon the general question of guilty or not guilty.<sup>1</sup>

*Once in Jeopardy.* The plea of *autrefois acquit* or *convict* rests on the ground that no man shall be twice put in jeopardy of life or limb, a protection which is guaranteed to every one by the Constitution.<sup>2</sup> But this protection it seems may be availed of in some cases where there has not been a previous trial and acquittal or conviction. But where there has been such acquittal or conviction upon a trial had, there is no question of its being an effectual bar to a second indictment for the same offense.<sup>3</sup>

Much discussion has been had as to when one charged with a crime may be said to have been put "in jeopardy" in respect to the same. This cannot be said to have been done until he shall have been put upon trial and a jury impaneled to try him. Up to that time the prosecution may *not*.

<sup>1</sup> 1 Chit. C. L. 435; *Rex v. Gibson*, 8 East, 111; *Rex v. Johnson*, 6 East, 602; *Reg. v. Goddard*. 2 Ld. Raym. 920.

<sup>2</sup> *Commonwealth v. Roby*, 12 Pick. 502; United States Constitution, 5th Amend't; Cooley's Const. Lim. 325.

The expression of "life or limb" refers to the different modes of treatment which in the early history of the law were applied to treason and the higher felonies, and which was originally capital. But by a law of William I. capital punishments were abolished and dismemberment was substituted, such as cutting off the hands or feet or other members. This law was repealed in the time of Henry I. so far as restoring capital punishment in certain cases of larceny. Reeves' Hist. (4th ed.) 25.

<sup>3</sup> 1 Whart. C. L. § 573a, 573b; 1 Bish. Cri. Proc. § 821, 828; Cooley's Const. Lim. 325.

*pros.* the proceedings and begin again. But as soon as the jury has been impaneled, the prosecution cannot enter a *nol. pros.* against the prisoner's consent; and if it does, and the prisoner is discharged, it has the same effect as a trial and acquittal. And it seems that if there be a verdict of guilty, and the prosecution then enters a *nol. pros.* as to any count of the indictment, as it may do before judgment, it would be a bar to a second prosecution for the same offense.<sup>1</sup>

To sustain the objection of having been once put in jeopardy, it is necessary that it be upon a charge for the same offense. And that often raises a question of much difficulty where the offenses charged are known by distinctive names, as murder and manslaughter, larceny and receiving stolen goods, and the like. Thus in *Commonwealth v. Roby*,<sup>2</sup> the prisoner to a charge of murder pleaded a former conviction for a felonious assault with intent to kill the same person with whose death he was now charged, in which case, however, there had been no judgment or sentence upon the verdict. It was held that the two offenses were essentially distinct, and the conviction or acquittal of the one was no legal bar to an indictment for the other. But this, it will be perceived, presents a different question from an indictment for murder, and a conviction for a felonious assault.

In another case, the prisoner was indicted for re-

<sup>1</sup> Bish. C. L. § 858; 1 Whart. C. L. § 574, b.; Cooley's Const. Lim. 325.

<sup>2</sup> 12 Pick. 496, 510.

ceiving stolen goods, describing them as so many yards of cloth. He pleaded a former conviction, but though he proved a former conviction for receiving a quantity of goods described as so many yards of cloth, the Court held that the former conviction was no bar, though the goods in both cases might be the same; he must show them to be so.<sup>1</sup>

In another case, the defendant was indicted for embezzling six hundred dollars in money. He pleaded a former acquittal by a municipal court upon trial for the same offense, and the prosecutor demurred. And as the municipal court had cognizance only to the amount of fifty dollars, it was insisted that the defendant, could not have been in jeopardy as to any part of the excess beyond the fifty dollars. But the Court held that as the demurrer of the prosecution admitted the offense to be the one tried by the municipal court, and as that court had cognizance of the offense to the extent of fifty dollars, it was an acquittal by a court having jurisdiction, and was a bar.<sup>2</sup>

It is not enough that the offense charged in the second indictment is similar to that charged in the first. It must be identical, and this must appear by the record with the requisite [averments] to identify the articles mentioned in each if described in the same general terms.<sup>3</sup>

<sup>1</sup> Commonwealth *v.* Sutherland, 109 Mass. 342.

<sup>2</sup> Commonwealth *v.* Bosworth, 113 Mass. 200; Commonwealth *v.* Hussey, 111 Mass. 434.

<sup>3</sup> 1 Chit. C. L. 459, 460; Commonwealth *v.* Sutherland, *sup.*; Moore, C. L. § 855.

If, however, the offense charged in one of the indictments embraces that charged in the other, as murder includes manslaughter, a conviction or acquittal of either is a bar to an indictment for the other.<sup>1</sup> So, where one upon an indictment for murder was convicted of manslaughter, and he made a motion for a new trial, which was granted, it was held that his former acquittal of murder was a bar as to that part of the original charge, in a trial upon the same indictment.<sup>2</sup> But if one commits two offenses of the same kind at the same time and is indicted for one of them and acquitted, it is no bar to an indictment for the other offense, as stealing articles of A and of B at the same time, or receiving them, if stolen, in the same package.<sup>3</sup>

The Massachusetts statute covers several of the questions which have been made as to the effect of a former acquittal or conviction. "No person shall be held to answer on a second indictment for an offense of which he has been acquitted by a jury upon the facts and merits; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment on which he was acquitted." "If a person on his trial is acquitted upon the ground of a variance between the indictment and the proof, or upon an

<sup>1</sup> Chit. C. L. 455; *Commonwealth v. Roby*, 12 Met. 504.

<sup>2</sup> *State v. Martin*, 30 Wisc. 216. A different rule was held in Kansas, and that a motion for a new trial waived the objection of being twice in jeopardy. *State v. McCord*, 8 Kans. 232.

<sup>3</sup> 1 Chit. C. L. 457; *Commonwealth v. Andrews*, 2 Mass. 413.

exception to the form or substance of the indictment, he may be arraigned again on a new indictment, and tried and convicted for the same offense, notwithstanding such former acquittal.”<sup>1</sup>

If by the common law one were arraigned upon an indictment which was insufficient in form or substance and no judgment could be rendered upon it, it was so far regarded as a nullity that the defendant was not considered as having been put in jeopardy, and could not plead it in bar to a new indictment.<sup>2</sup>

By statute in Massachusetts if one be indicted for felony and is acquitted of part of the charge and convicted of the residue, the court is authorized to render judgment upon such part as is substantially charged in the indictment, if it be an offense, although it be not a felony.<sup>3</sup>

If the court before whom the former trial took place had no jurisdiction of the offense, the acquittal or conviction cannot be pleaded, as the defendant never was in jeopardy.<sup>4</sup>

Where the first trial failed by reason of material variances between the allegation in the indictment and the proof, it would be no bar to the second indictment, as where the indictment charges the de-

<sup>1</sup> Gen. St. c. 158, §§ 6, 7.

<sup>2</sup> *Commonwealth v. Roby*, 12 Pick. 502; 1 Whart. C. L. § 587; *People v. Barret*, 1 John. 66; 1 Chit. C. L. (Perk. ed.) 455, note.

<sup>3</sup> Gen. St. Mass. c. 172, § 16; *Commonwealth v. Squire*, 1 Met. 262; *Commonwealth v. Goodhue*, 2 Met. 193.

<sup>4</sup> *Commonwealth v. Peters*, 12 Met. 390; *Commonwealth v. Roby*, 12 Pick. 302; *State v. Hodgkins*, 42 N. H. 474.

fendant with stealing the goods of A, and the proof is that he took the goods of B.<sup>1</sup> So, where the charge was for burning the barn of *Josiah M.*, and the proof was that it was the barn of *Josias M.*<sup>2</sup> So, where defendant was tried upon the charge of burning the barn of N and G, but the proof negatived the ownership by G, and he was then indicted again for burning the barn of N and others, naming them, to which he pleaded former acquittal; whereupon, the prosecution prayedoyer of the record and demurred to the plea, it was held that the offense charged was not the same as in the first, and he was required to plead to the indictment.<sup>3</sup>

The question whether and in what cases one can plead or take advantage of having been in jeopardy, in bar of a second indictment or a second trial for the same offense charged in the first indictment, involves the inquiry as to the power of the Court to discharge the jury after they have been impaneled, before returning a verdict, where it is done without or against the consent of the defendant. The power seems to be in a measure a discretionary power with the Court; but the cases where it has been exercised, are like the following: Where the jury have deliberated without being able to agree, so long that the Court is satisfied they cannot agree, the Court may discharge them, and the defendant may be tried again for the same offense, even in capital

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 455, and note. See Gen. Stat. Mass. c. 158, §§ 6, 7, already quoted, *ante*.

<sup>2</sup> *Commonwealth v. Mortimer*, Virg. Cases, 325.

<sup>3</sup> *Commonwealth v. Wade*, 17 Pick. 396.



cases.<sup>1</sup> So, if by reason of sickness or sudden death of a juror, or sickness of the prisoner or a witness, or the prisoner absconds, or other urgent necessity, the progress of the trial is interrupted, the jury may be discharged, and a new one impaneled, and the prisoner again be put upon his trial.<sup>2</sup>

And yet, if the jury be discharged irregularly without sufficient cause, the defendant cannot be again tried, if he objects. In a capital case, in California, the jury had been long deliberating, when the judge inquired of them if they were agreed, and they answered they were not, and could not agree. Without discharging the jury, he thereupon adjourned the court without day, although there were two more days in the regular term, and it was held that the defendant could not be held to a second trial; whereas, if the term had expired, and the jury had thereby been discharged, it would have been otherwise.<sup>3</sup>

The following case may serve to illustrate further the effect of discharging a jury irregularly upon holding a defendant liable to a second trial. The defendant was charged with breaking and entering with intent to steal and stealing, which in Alabama is held to be charging two distinct felonies. But if charged in one count, only one judgment can be

<sup>1</sup> *Commonwealth v. Purchase*, 2 Pick. 521; *People v. Goodwin*, 18 John. 187; *Winsor v. Queen*, L. R. 1 Q. B. 289. See, as to different rules in this respect of the courts of the different States, 1 Whart. C. L. §.574-586.

<sup>2</sup> *Commonwealth v. Roby*, 12 Pick. 502, 503; *Commonwealth v. Wade*, 17 Pick. 399.

<sup>3</sup> *People v. Cage*, 48 Cal. 323.

awarded. If charged in separate counts, and a verdict of guilty be found as to the charge of burglary, but nothing is said of that of stealing, it would be tantamount to an acquittal of the charge of larceny. If, then, a new trial is granted upon an appeal by the defendant, he cannot be tried for the larceny, and if the jury find him guilty of larceny, and the court takes the case from them and saves them from deliberating upon the charge of burglary, the verdict as to the larceny is a nullity, and the taking the case from the jury without the consent of the defendant is a virtual acquittal of the charge of burglary.<sup>1</sup>

The test given in one case of determining whether the offense charged in the second indictment is the same as that of which the defendant was convicted or acquitted in the first, is that unless the defendant could have been convicted upon the first indictment by proof of the facts contained in the second, an acquittal on the first would not be a bar to the second.<sup>2</sup>

It may be added when considering the identity of crimes, that if one is charged as an accessory and tried and acquitted, it is no bar to an indictment against him as a principal.<sup>3</sup>

Such being the effect of a judgment of acquittal or conviction, upon a second charge for the same

<sup>1</sup> *Bell v. State*, 22 Am. L. Reg. 752.

<sup>2</sup> *Commonwealth v. Roby*, 12 Pick. 504; *East*, P. C. 522; *Commonwealth v. Goodenough*, Thach. C. C. 132; 1 Chit. C. L. 452.

<sup>3</sup> *Commonwealth v. Roby*, 12 Met. 504.

offense, it is sometimes an object for one who has been guilty of a crime to have his case brought before some friendly tribunal where he shall escape by an acquittal or a favorable sentence. And therefore cases have occurred where a friend has complained of another for assault and battery before a magistrate who, after a partial trial, has rendered a favorable judgment, and when he has been indicted for the same offense he has pleaded this prior judgment in bar. Under such a plea, the inquiry is, whether the first judgment was obtained by fraud, or not? If it was, it is treated as a nullity. If, therefore, the magistrate had jurisdiction of the matter, and the defendant pleads the former judgment, to which the prosecution demurs, it will be a good and conclusive bar. The prosecution should reply fraud in order to meet the plea.<sup>1</sup>

A conviction or acquittal by one court would be a bar to any prosecution in another, if the first had jurisdiction of the party and subject matter, even though the first judgment is reversable upon error, provided it has not been actually reversed.<sup>2</sup>

*Pardon.* In England and some of the States, as is the case in the United States, it is competent for the executive to extend pardon to one who has

<sup>1</sup> *Commonwealth v. Cunningham*, 13 Mass. 246; *Commonwealth v. Goddard*, 13 Mass. 456; *State v. Little*, 1 N. H. 256; *Commonwealth v. Dascom*, 111 Mass. 404.

<sup>2</sup> 1 Chit. C. L. 458, and Perkins' note.

[The subject of jurisdiction in its various phases, is extensively considered and the cases collected by Mr. A. M. Pence, in 8 Chicago Legal News. 62, 70. 78.]

been guilty of an offense, before trial. In Massachusetts, [Illinois], and some other States, this can only be done after conviction. In the former States therefore, there may be a special plea in bar of pardon.<sup>1</sup>

*Nol. pros.* In view of the effect of a plea of having been once in jeopardy, upon a second indictment for the same offense, it may be proper to define more fully than has been done before, the rules which have been practically applied in cases where in order to avoid this effect the prosecution proposes to enter a *nol. pros.* before conviction. Where this is done before conviction, it is no bar to a second prosecution. It is often, therefore, an important right on the part of the defendant to insist upon a verdict where the jury have been once impaneled to try his case.

Whether a *nol. pros.* shall be allowed, when objection is made by the defendants, depends upon the Court, which, though it never orders it to be entered, sometimes permits it to be done, and at others, refuses.<sup>2</sup> The rule seems now to be settled, as before stated, that after the cause is opened to the jury, the government has no right to prevent a verdict by interposing a *nol. pros.* without the defendant's consent.<sup>3</sup>

<sup>1</sup> 1 Chit. C. L. 469; Mass. Const. c. 2, § 1, Art. 8; Const. Ill. 1870, Art. 5, § 13.

<sup>2</sup> Commonwealth v. Andrews, 2 Mass. 414; Commonwealth v. Wade, 17 Pick. 399.

<sup>3</sup> Commonwealth v. Tuck, 20 Pick. 356; Commonwealth v. Briggs, 7 Pick. 179; Commonwealth v. Wade, 17 Pick. 395; 1

*Not Guilty.* By the plea of "not guilty" there is put in issue the whole substantial matter of charge contained in the indictment, including the doing of the act, the intention with which it was done, and the legal quality of the guilt to be deduced from the whole.<sup>1</sup> [Not only so, but the defendant may also give in evidence under it, all matters of excuse and justification.]<sup>2</sup>

### III. THE TRIAL AND ITS INCIDENTS.

After the pleadings are closed, and before the trial begins, there are several things to be considered on the part of the defendant, under certain circumstances, and especially in such matters as address themselves to the discretion of the judge. In respect to these, there is no proper plea in abatement or in bar, nor any mode of limiting or restraining the act of the judge by any process of arresting judgment or reversing it by error.

*Separate Trials.* One of these relates to separate trials, where two or more are included in the same indictment. It is often embarrassing to one defendant to be associated with another in the same trial, and courts are accordingly appealed to, to permit a separate trial to be had. This is especially important in capital cases, where the prisoner, as will hereafter be stated, has a right peremptorily to

Chit. C. L. 480, Perkin's note; Commonwealth v. Goodenough, Thach. C. C. 134; 1 Whart. C. L. § 513.

<sup>1</sup> 1 Chit. C. L. 471.

<sup>2</sup> 1 Bish. Cr. Proc. § 799; Moore, C. L. § 853; Tiff. C. L. 404, and the authorities therein cited.

challenge a certain number of jurors, and it often happens that one of two prisoners indicted together, may challenge the very jurors whom the other might prefer to have upon the panel.<sup>1</sup> But in all these cases, it is purely a matter of judicial discretion, whether a motion for a separate trial shall be granted or not,<sup>2</sup> though as to cases involving the right of peremptory challenge, a difference in practice has prevailed.

In the first place, if two are jointly indicted and tried for an offense which cannot be jointly committed, it would be error; as where six were indicted together for perjury and four were convicted, judgment was arrested, because perjury cannot be the joint act of several.<sup>3</sup>

In New York the Court in one case say: "In all

<sup>1</sup> [The right of peremptory challenge is in no respect abridged or affected by a joint trial. Each prisoner can challenge the full number of jurors, without regard to what may be done by others. *Martin v. The People*, 15 Ill. 536; *Schoeffler v. State*, 3 Wisc. 823; *Bixbe v. The State*, 6 Ohio, 41.]

<sup>2</sup> [See *Commonwealth v. James*, 99 Mass. 438; *Commonwealth v. Thompson*, 108 Mass. 461; *Maton v. The People*, 15 Ill. 537; *Johnson v. The People*, 22 Ill. 315; *Bixbe v. The State*, 6 Ohio, 41; *Hawkins v. The State*, 9 Ala. 137; *United States v. Marchant*, 12 Wheat. 480; *State v. Nash*, 7 Iowa, 348; *State v. Marvin*, 12 Iowa, 499; *State v. Gigher*, 23 Iowa, 318; *State v. Hunter*, 33 Iowa, 361; *State v. Soper*, 16 Me. 293. See, however, *White v. The People*, 81 Ill. 333, cited *post*. By Section 4424, of the Iowa Code (1873), it is provided that "when two or more defendants are jointly indicted for felony, any defendant requiring it, may be tried separately. In other cases, defendants jointly indicted, may be tried separately or jointly, in the discretion of the Court."]

<sup>3</sup> *King v. Phillips*, 2 Strange, 921.

cases, at least where the right of peremptory challenge does not exist, and two persons are indicted jointly, they may be tried jointly or separately, at the discretion of the Court. This is the settled practice both here and in England, and no objection to it exists sufficient to outweigh the public convenience of the rule.”<sup>1</sup> The same doctrine was applied in capital cases in Maine and the Court of the United States.<sup>2</sup>

In the case of *United States v. Marchant*, the Court made no limitation in the exercise of this discretionary power in case of capital trials, although it might result in a peremptory challenge by one prisoner of a juror whom the other might prefer to sit on the trial; because the right of challenge is not given by the way of enabling the prisoner to choose who should be a juror, but to guard against any one serving upon the panel who is for any reason objectionable to the accused.<sup>3</sup>

So, it was held that it was no objection to a conviction that the Court refused to two defendants, charged in the same indictment, separate trials, although by reason of it one of them was prevented from calling a witness which he might have done, if tried separately, though this objection no longer exists where parties may be witnesses in their own behalf.<sup>4</sup>

<sup>1</sup> *People v. Howell*, 4 John, 300; 1 Bish. Cr. Proc. § 1030.

<sup>2</sup> *State v. Soper*, 16 Me. 295; *United States v. Marchant*, 12 Wheat. 480; 1 Chit. C. L. 267, and Perkins' note.

<sup>3</sup> See *Bixbe v. State*, 6 Ohio, 41; *Martin v. The People*, 15 Ill. 536.

<sup>4</sup> *Commonwealth v. Robinson*, 1 Gray, 555, where principal and accessory were indicted and tried together.

[But in a case in Illinois, where two persons were indicted for murder, and both were tried by the same jury, and it appeared that many portions of the evidence competent as against one, were not, by reason of the peculiar circumstances surrounding the case, competent against the other, but still in effect were very damaging to the party against whom such testimony was not competent, it was held that the defendants should have been given separate trials.<sup>1</sup>]

*Competency of Defendants as Witnesses.* By the common law where several defendants are indicted together, one of them cannot become a witness against the other, and this extended to the exclusion of the wife of one of these defendants.<sup>2</sup> But by statute now in Massachusetts a person who is indicted may, if he please, testify as a witness upon his trial.<sup>3</sup> So may husband and wife be witnesses in respect to other matters than private conversations with each other. But neither can be required to testify in the trial of a complaint or indictment against the other.<sup>4</sup>

If there is no evidence against one of two or more defendants upon a trial, in the judgment of

<sup>1</sup> *White v. The People*, 81 Ill. 333.

<sup>2</sup> 1 Chit. C. L. 595, 626; *Commonwealth v. Marsh*, 10 Pick. 57; *Commonwealth v. Robinson*, *sup*; *People v. Bill*, 10 John. 95; *State v. Mooney*, 1 Yerger, 431; *Rex v. Smith*, 1 Mood. C. C. 289. See, also, *Miner v. The People*. 58 Ill. 59.

<sup>3</sup> So, also, in Illinois. Rev. Stat. 1874, 410, § 426. In Michigan the defendant is at liberty to make a statement to the court or jury upon which he may be cross-examined. Comp. Laws, 1871, § 5976.]

<sup>4</sup> Stat. Mass. 1870, § 393.



the Court, the judge may upon motion direct a verdict of acquittal to be returned by the jury, and he may then be admitted as a witness.<sup>1</sup> But if there is any evidence against any defendant, it is discretionary with the Court whether it will allow his case to be passed upon by the jury separately from that of the other defendants or submit all the cases to the jury at the same time, although "it is one of the peculiarities of the trial of an indictment against several persons, who are jointly charged with the commission of one and the same crime, that each is entitled to pursue and maintain for himself his own peculiar line of defense."<sup>2</sup>

*Election upon which count to proceed.* A like principle is applied in those cases where an indictment contains several distinct charges which it is inconvenient or unsafe for the defendant to answer in one trial. The Court in such case may, on the defendant's motion, quash the indictment or require the prosecution to elect which of the charges it will pursue; and a motion to that effect may be made at any time before the case is given to the jury. But it appeals after all to the discretion of the judge, and if he refuses the motion, it is no ground for a new trial or arrest of judgment.<sup>3</sup> The course of

<sup>1</sup> 1 Chit. C. L. 626.

<sup>2</sup> Commonwealth v. Eastman, 1 Cush. 218; Commonwealth v. Robinson, 1 Gray, 560; 1 Chit. C. L. 627.

<sup>3</sup> Archb. C. P. (7th ed.) 55a; Cro. Cir. Comp. 41; Commonwealth v. Tuck, 20 Pick. 362; Josslyn v. Commonwealth, 6 Met. 239; Carlton v. Commonwealth, 5 Met. 534. See Moore, C. L. § 800, and cases cited.

proceeding in England in these and similar cases is thus stated by BULLER, J., in *Young v. The King*: If it appear, before the defendant has pleaded, or the jury are charged, that the indictment containing several counts charges separate offenses, it has been the practice of the judges to quash the indictment, lest the defendant should be embarrassed. If it is not discovered in time to do this, they may put the prosecutor to elect on which charge he will proceed. But these are no objections to the judgment, and it is wholly discretionary with the judge. So, where the evidence affects several persons differently, the judge selects the evidence applicable to each, and leaves their cases separately to the jury. In one case, where two were indicted and tried for a murder, and certain evidence against one was not admissible against the other, he summed up separately to the jury, and took a separate verdict against them. But all these are matters of discretion only, which judges exercise in order to give a prisoner a fair trial; [for when a verdict is given they are not the subject of any objection to the record.]<sup>1</sup>

*Impaneling the Jury—Challenges.* The next step in criminal procedure, after disposing of these preliminary measures which stand in the way of proceeding with a trial, is to impanel a jury to try the issue which has been raised by the pleadings in the case. The mode of summoning a petit or traverse jury, as juries are designated who are to pass

<sup>1</sup> 3 Term. 106; *Commonwealth v. Robinson*, 1 Gray, 561.

upon these issues, varies in different States according to the provisions of their respective statutes, and it is not thought necessary to add anything to what has been said in respect to the issuing and service of a *venire facias*. Nor is it important to point out the different modes by which the individuals are selected whose names are to be borne upon the panel of the particular jury in any case. In some States they are drawn from a box or revolving wheel containing the names of all the jurors summoned. But in either form, as they are ascertained in succession, their names are called in the presence and hearing of the prisoner. This is preceded by a formal notice orally given to the prisoner, that he is now to be tried on the indictment found against him, and that the good men whom the clerk should call, are to pass between him and the Commonwealth, and that if he would object to them, he must do so when they were called, and before they are sworn. And if the trial be a capital one, as the juror is called, he is directed to look upon the prisoner, and the prisoner is told to look upon the juror. This is preliminary to exercising the right of challenge which the prisoner has a right to make, in some cases peremptorily, in others for cause, in the following manner: In the former case the prisoner, when directed to look upon the juror, pronounces the word "challenged," without any cause given.<sup>1</sup>

By the common law peremptory challenges, that is objecting to a juror's serving upon a panel without

<sup>1</sup> Mass. Stat. § 1873, c. 308.

assigning any reason, was limited to capital trials, and might be exercised by the defendant to the number of thirty-five. But this has been variously altered by statutes, both in England and this country.<sup>1</sup> In Massachusetts the right of peremptory challenge is extended to capital cases and to such as involve imprisonment for life in the State's prison, and is limited to the number of twenty, so far as the defendant is concerned.<sup>2</sup> And now by statute the prosecution may in such cases exercise this right of peremptory challenge of twenty-two jurors, and on the trial of any lesser offense it may challenge two jurors in like manner. But this was not allowed by the English statute.<sup>3</sup>

This right of peremptory challenge is a personal one, and if two are tried upon the same indictment, each has a right to exercise the privilege to its full extent, though in so doing he may exclude from the panel jurors whom the other party might wish to retain upon it.<sup>4</sup>

<sup>1</sup> 1 Chit. C. L. 535, and Perkins' note; 1 Bish. Cr. Proc. §§ 940, 943.

<sup>2</sup> Gen. Stat. Mass. c. 172, § 4.

[So, also, in Illinois, (Rev. Stat. 1874, 411, § 432,) and Iowa (Code, 1873, § 4413). In Illinois, where the offense may be punished by imprisonment for a term exceeding eighteen months, ten peremptory challenges are allowed the defendant, and in all other criminal trials, six. The prosecution is entitled to the same number of peremptory challenges as the accused. Rev. Stat. 1874, 411, § 432.]

<sup>3</sup> Mass. St. 1875, c. 167. See 1 Bish. Cr. Proc. § 940, for other States; 4 Black. Com. 353.

<sup>4</sup> United States v. Marchant, 12 Wheat. 480; Maton v. The People, 15 Ill. 536; Bixbe v. The State, 6 Ohio, 41; Schoeffler

The right of peremptory challenge is limited to the trial of the main issue of guilty or not guilty, and does not extend to collateral issues in bar or in abatement.<sup>1</sup>

If the prisoner allows a juror to be sworn without interposing objection, it is too late to challenge him peremptorily; and, in an English case, it is held that this must be done before he begins to take the oath, or it will be too late.<sup>2</sup> And it has been held that, if a prisoner would challenge a juror, he must do it before the juror has been inquired of by the Court, as to his bias or prejudice or holding such opinions as would preclude him from finding any defendant guilty of an offense punishable with death.<sup>3</sup>

In some cases, the Court will permit the prisoner to waive a challenge which he has made.<sup>4</sup>

There is no limit to the number whom a prisoner may challenge as jurors for cause, if a good cause exists why they should not act in the trial of his case. Nor does the challenging for cause prevent the prisoner from peremptorily challenging the

*v. State*, 3 Wis. 823; 1 Chit. C. L. 509, and Perkins' note, 535 and note; *Brister v. State*, 26 Ala. 107; 7 Dane Abr. Ch. 221, Art. 4, § 5; 2 Hale, P. C. 268; Moore, C. L. § 919; *Commonwealth v. James*, 99 Mass. 440.

<sup>1</sup> 7 Dane, Abr. c. 221, Art. 4, § 5; 2 Hale, P. C. 267; 1 Bish. Cr. Proc. § 942; 1 Chit. C. L. 535; 4 Cooley's Black. 352, note.

<sup>2</sup> 1 Bish. Cr. Proc. § 945; *Commonwealth v. Knapp*, 10 Pick. 480; *Reg v. Frost*. 9 C. & P. 129; Moore, C. L. § 919.

<sup>3</sup> *Commonwealth v. Rogers*, 7 Met. 500; *Commonwealth v. Webster*, 5 Cush. 297.

<sup>4</sup> *Commonwealth v. Twombly*, 10 Pick. 480, note.

same juror if he fails to show cause why he should not act.<sup>1</sup> As the prisoner loses nothing in the way of his right to challenge a juror peremptorily, by doing so for cause, it is obviously better to reserve the former right, until after the question in respect to the latter has been settled; for, if he fails in his challenge for cause, he can still resort to his peremptory challenge.

What shall be a sufficient cause why a juror should not act in a trial, is often a question of considerable difficulty. By statute in Massachusetts, if his opinions preclude him from finding a defendant guilty of an offense punishable with death, a juror is not permitted to sit upon a jury in a capital case;<sup>2</sup> [and the rule may be laid down generally, that the fact that a juror holds opinions which would prevent him from agreeing to a verdict of guilty in accordance with the law of the land, will disqualify him from serving on the jury.<sup>3</sup>]

There is a challenge to the array which excepts to the whole panel by reason of some error or defect in making the return to the *venire*, which oc-

<sup>1</sup> 1 Chit. C. L. 545, and Perkins' note; 1 Bish. Cr. Proc. § 945, and note; *Hooker v. State*, 4 Ohio, 348; 4 Black. Com. 353; Mass. Stat. 1873, c. 317, § 1.

<sup>2</sup> Gen. St. c. 172, § 5.

[So, in Illinois in trials for murder it is a cause for challenge, if the juror on being examined states that he has conscientious scruples against capital punishment, or that he is opposed to the same. Rev. Stat. 1874, 411, § 433.]

[<sup>3</sup> *Gates v. The People*, 14 Ill. 433; *Pierce v. The State*, 13 N. H. 536; *People v. Keys*, 5 Cal. 347; *Commonwealth v. Austin*, 7 Gray, 51; 1 Bish. Cr. Proc. § 917; Moore, C. L. § 910.]

curs too rarely in practice to be a subject of discussion here.<sup>1</sup>

The ordinary challenge for cause is upon the ground of some presumed or actual partiality in the juror who is made the subject of objection.<sup>2</sup> The inquiry in such cases is whether "the juror stands indifferent between the parties to the issue."<sup>3</sup>

If one have several causes of challenge against a juror, he shall make them and have them tried at one and the same time.<sup>4</sup>

What are the general grounds upon which a juror may be objected to, are pretty fully expressed by the form of the oath which either party may move the Court to administer to the juror who is objected to, by the statutes of Massachusetts: 1. Whether he is related to either party; 2, or has any interest in the cause; 3, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein. And after he has answered these inquiries it is competent for the party objecting to offer proof in support of his objection. But this does not apply to opinions upon questions of pure law, unless such opinion is adverse to a conviction of the defendant independent of the evidence.<sup>5</sup>

By statute in Massachusetts the Court hears the

<sup>1</sup> 1 Chit. C. L. 536.

<sup>2</sup> 1 Chit. C. L. 541, and Perkins' note.

<sup>3</sup> 1 Chit. C. L. 549; 7 Dane, Abr. c. 221, art. 6, § 4.

<sup>4</sup> Dane, Abr. *sup.*

<sup>5</sup> Gen. Stat. c. 132, § 29; *Commonwealth v. Abbott*, 13 Met. 123; *Commonwealth v. Austin*, 7 Gray, 51; 1 Bish. Cr. Proc. § 917. [See generally as to disqualification by having formed an opinion, Moore, C. L. § 909, and cases cited.]

evidence that may be offered as to whether the juror, who is challenged stands indifferent, and decides the issue.<sup>1</sup> But in England, New York and some other of the States this question is determined by what are called triers. The mode in which this is done is this: If the first juror called upon the panel is objected to, the Court appoints two indifferent persons to hear and try the matter. If they adjudge him indifferent, he is sworn; otherwise he is set aside. If the next one called is objected to, the juror who has been sworn becomes one of the triers. When two or more have been sworn, two of them are made the triers. And the triers may hear evidence and examine the juror himself upon whose competency they are passing. In Tennessee [and New Hampshire, and perhaps in other States,] the Court settles the question.<sup>2</sup>

By an early English statute, a foreigner, who is indicted and put upon trial, may insist upon having the jury, which is to pass upon his guilt, made up of an equal number of foreigners and citizens or denizens, and this has been adopted by some of the States, while in others it has never been applied.<sup>3</sup> But, to avail himself of this privilege, the defendant must claim it before the jury is sworn. Nor can he insist that the aliens who are to serve upon

<sup>1</sup> Gen. Stat. c. 132, § 29.

<sup>2</sup> 1 Chit. C. L. 540, and Perkins' note; 3 Black. Com. 363. [Rollins v. Ames, 2 N. H. 350; McGowan v. State, 9 Yerg. 184; State v. Wall. id. 347; Moore, C. L. § 914; Winnesheik Ins. Co. v. Schneller, 60 Ill. 473.]

<sup>3</sup> 1 Bish. Cr. Proc. § 927; 1 Chit. C. L. 525.



the jury, should be his own countrymen. The law of Massachusetts does not provide for impaneling foreigners in the trial of a foreigner. It is abolished in New York [and Illinois].<sup>1</sup>

*Oath of Jury.* If no challenge is made, or, if made, it is not sustained, and the juror is not peremptorily challenged, an oath is administered by the clerk of the court to such as are to serve upon the trial, the form of which serves to indicate the proper duty of jurors in criminal trials. It is substantially the form which has been in use from the earliest period of the history of the English criminal law, and has been universally adopted in the United States.<sup>2</sup> The form is to "well and truly try the issue between the Commonwealth and the defendant, according to their (your) evidence." And, if the trial be a capital one, the oath is to "well and truly try, and true deliverance make, between the Commonwealth and the prisoner at the bar, whom you shall have in charge, according to your evidence."<sup>3</sup> There is a difference in phrase-

<sup>1</sup> 7 Dane, Abr. c. 221, Art. 6, § 2; 2 Hale, P. C. 271; 1 Chit. C. L. 525, and Perkins' note; Rev. Stat. Ill. 1874, 411, § 430; Rev. Stat. N. Y. pt. 3, ch. 7, tit. 4, § 176.

<sup>2</sup> 1 Bish. Cr. Proc. § 983.

<sup>3</sup> Gen. Stat. Mass. c. 172, § 6.

[The form of oath as laid down by Mr. Moore, in his work on Criminal Law, (§ 921), as administered in Illinois, is as follows: "You, and each of you, do swear by the ever living God, (or 'you do solemnly, sincerely and truly, declare and affirm'), that you will well and truly try the issue, ('or issues,') between the people of the State of Illinois, and the prisoner at the bar, in the cause now in hearing, and a true verdict give according to law and evidence, unless discharged by the court."]

ology between this oath and the one administered to jurors in civil cases, which closes with, "according to the law and evidence given you," instead of "according to your evidence."<sup>1</sup>

*Jury as Judges of the Law.* From this and other considerations growing out of trials by jury under the constitution and laws of this Commonwealth, has arisen much discussion how far a jury in a criminal trial are at liberty to judge in matters of law as well as of fact in rendering their verdict. This right of "deciding in their discretion by a general verdict both the fact and the law involved in the issue," is expressly given them by statute.<sup>2</sup> But in a case involving the inquiry, how far this statute is constitutional, a majority of the Court held that jurors had no right to determine questions of law against the instructions of the Court, notwithstanding the authority given by statute.<sup>3</sup> The right of juries in criminal cases to form an independent judgment of the law involved in the trial has been variously held in this country, in some cases by the Constitution of the State, in others by statute, and in others by the opinions of the courts, as will be seen by a reference to the authority cited below.<sup>4</sup>

<sup>1</sup> Commonwealth v. Anthes, 5 Gray, 275.

<sup>2</sup> Gen. Stat. Mass. c. 172, § 15.

[So, also, in Illinois. Rev. Stat. 1874, 411, § 431; Schnier v. The People, 23 Ill. 17; Fisher v. The People, id. 283.]

<sup>3</sup> Commonwealth v. Anthes, 5 Gray, 185, in which the doctrine of Bushel's case, Vaughn, 135, is examined, and that of

<sup>4</sup> 1 Bish Cr. Proc. § 984, 985.

*Reading of Indictment.* As soon as the oath has been administered to the jury, the clerk charges them "to hearken to an indictment found against the prisoner," which he then reads to them, and having concluded the reading, he instructs them that "they are to try the issue between the Commonwealth and the prisoner at the bar; if he is guilty, they are to say so; if he is not guilty, they are to say so, and no more."<sup>1</sup>

*Talesmen.* It sometimes happens that by reason of challenges the panel of jurors returned to the court is exhausted before a full panel of twelve shall have been obtained for the trial of a criminal case, and in such cases it is competent for the Court to fill the same by calling upon the bystanders or other persons in the county, known as talesmen, not to exceed in any one jury five. These men are selected and returned by the sheriff or his deputy, or by some disinterested person appointed by the Court, and are to be such as are qualified as jurors and liable to be drawn as such.<sup>2</sup>

*View.* A motion is often made, before proceeding with a trial, after the jury has been sworn, for what is called "a view," where it is thought important for understanding the testimony which may be given in the case, that the jury should visit the lo-

the Dean of St. Asaph's case, in which Erskine vindicated the independence of the jury in such cases. 3 Term, 428, note.

<sup>1</sup> King v. Dowlin, 5 Term, 313; 1 Bish. Cr. Proc. § 960; 2 Hale, P. C. 64; Moore, C. L. § 980.

<sup>2</sup> Mass. Gen. Stat. c. 132, §§ 27, 28; 1 Chit. C. L. 518. See, also, Rev. Stat. Ill. 1874, 633, § 13.

cality of the alleged crime, and look at such objects as either party may wish to call to their attention. By the common law this was never allowed in capital trials, but in England and Massachusetts courts may now permit it to be done upon the request of either of the parties.<sup>1</sup> This is done by sending the jurors under charge of an officer and a person selected to attend them on each side; but no evidence or discussion beyond pointing out the objects to be viewed, is allowed in the presence of the jury while performing this service.

*Proceedings upon the Trial—Criminal Evidence.* When the cause is ready for trial the prosecution opens by briefly stating to the jury the facts which it is proposed to show in support of the charges contained in the indictment, and the law applicable thereto, whereupon he proceeds to call and examine his witnesses and read his written evidence, and the defendant, or his counsel, makes such objection to the admissibility thereof as he thinks proper, and cross-examines the witnesses that the prosecutor has examined. And when the evidence for the prosecution has closed, the defendant, or his counsel, opens the defense and calls his witnesses, or reads his written evidence, the prosecutor objecting thereto and cross-examining the defendant's witnesses. And when the evidence for the defense has closed, the prosecutor may introduce

<sup>1</sup> 1 Chit. C. L. (Perk. ed.) 483, and note; Commonwealth v. Park, 2 Pick. 550; Commonwealth v. Knapp, 9 Pick. 496; Gen. Stat. c. 172, § 9.

rebutting evidence, if the defendant offers new matter in his defense.<sup>1</sup>

After the evidence upon one side and the other is closed, it is for the defendant or his counsel to sum up, as it is called, to the jury, by commenting upon the evidence and offering such arguments and suggestions as may be pertinent to the issue. And this is followed by a like summing up by the prosecution, though in some of the States the defendant in a criminal trial is entitled to the close. How this should be done, depends so much upon the ability and judgment of those who conduct the trial, and the direction which the Court may give in respect to what is admissible and proper, that, as a subject, it is outside of the limits of an elementary treatise. But it involves questions of sufficient interest and importance as to what is required and what is admissible in evidence, to call for a general reference to the rules which prevail in criminal trials in our courts, though it is hardly necessary to add that the subject of evidence, as a whole, is too broad to be treated of in such a work. Its familiar doctrines, and their application in the trial of criminal causes, is all that will be attempted.

It may be accepted as an elementary principle in the trial of all criminal charges, that the prosecution must prove the *corpus delicti*, before attempting to charge its commission upon the defendant. Cases have occurred where persons have disappeared under suspicious circumstances, and others have

<sup>1</sup>1 Bish. Cr. Proc. § 962; 1 Chit. C. L. 623; Moore, C. L. § 931, and cases cited.

been tried and convicted for murdering them, where it has subsequently been shown that the person alleged to have been murdered, was actually alive. Such a case is reported in Coke's 3d Inst. 231, Guinnett's case, 2 Stark. Ev. 710, and 2 Hale, P. C. 290. And to these may be added the famous case of the Boorns, in Vermont, where the defendants were convicted upon their own confession of having murdered a man who made his appearance a short time previous to the day fixed for the execution of the defendants.<sup>1</sup>

When considering the subject of witnesses, the first question is, how many are required in order to sustain the charge? Ordinarily there is nothing to prevent a jury from rendering a verdict of guilty upon the testimony of a single witness, if the jury believe it. But, in order to convict a defendant of treason or perjury a different rule prevails. In the case of treason the rule requires two witnesses at least of the overt act charged in the indictment, to warrant a verdict of guilty against the prisoner. It is not enough that two or more witnesses testify to acts of treason committed by him, unless two at least are able to testify to some one overt act, or unless the defendant makes confession of his guilt in open court.<sup>2</sup>

<sup>1</sup> 1 Greenl. Ev. § 214, note; 1 Whart. C. L. § 683.

<sup>2</sup> 1 Chit. C. L. 560, 561; Moore C. L. §§ 320, 699; 1 Greenl. Ev. § 255, 256. See Rev. Stat. Ill. 1874, 392, § 264.

It was to escape the stringency of this rule, which has been in force since 1 Ed. VI., that Parliament created bills of attainder from time to time which condemned the obnoxious party in cases where the requisite amount of proof could not be found. This

On the trial of a defendant for perjury it is obvious that if the prosecution produced a single witness only, it would present a case where there would be one witness testifying against what another witness had testified in a former trial. Something more, therefore, is required than the testimony of a single witness, though it does not necessarily require that there should be two witnesses called to testify against the party charged, upon the precise point of the alleged perjury. It will be competent for a jury to convict the defendant, if the witness who testifies against him is sustained or confirmed by other additional competent evidence, and there must be this evidence in respect to each count in order to sustain it.<sup>1</sup>

A general rule in every criminal trial is that no statement of any person can be admitted as evidence, unless the same be verified by oath, though if it be a confession of the defendant, the fact of its having been made is competent evidence.<sup>2</sup>

was done in the case of Sir John Fenwick, in the time of Wm. III., notwithstanding the act of 7 Wm. III., passed the year before his impeachment, requiring the oaths of two lawful witnesses. This was the last case of such impeachment in England. 5 Hargrave's State Trials, 40. The 25th Article of the Bill of Rights of Massachusetts forbids the legislature to declare any one guilty of treason or felony.

<sup>1</sup> Roscoe, Cr. Ev. 769; 1 Chit. C. L. 563, and Perkins' note; 1 Greenl. Ev. § 257, 257a.

<sup>2</sup> 1 Chit. C. L. 568, 569.

Though this is now a well established rule, and is claimed to be a part of the common law, there appear to have been times when it was scandalously disregarded in state trials in England, as was done in the trial of Sir Walter Raleigh for high treason. Salmon's Review, 51.

One of the exceptions to this rule, is the admission of the dying declarations of one who has been murdered, as to the person who committed the act, in a trial of an indictment against him for such homicide. To render such declaration competent, it must have been made with a certain expectation of immediate death. And whether it comes within that limitation, so as to be competent evidence, is a question for the Court to determine.<sup>1</sup>

When and how far the confession of a prisoner charged with an offense may be competent evidence against him upon his trial, has been a prolific source of inquiry and discussion. If voluntarily and intelligibly made, it is evidence of the strongest kind. But confessions have so often been obtained by improper influence, or been made under such circumstances of mental weakness or disturbance, as to detract in part or altogether from their value as evidence, that in order to their being admitted, the Court must ordinarily pass upon the question of their competency. If a confession is obtained under a promise of gaining favor thereby, or threats of injury if it is not made, the Court will not hold it competent, and of this the Court is to judge.<sup>2</sup>

Confessions are often obtained and sometimes may be used against the party making them, when one of two or more defendants are indicted for

<sup>1</sup> 1 Greenl. Ev. §§ 156, 158; 1 Chit. C. L. 569, and Perkins' note; *Commonwealth v. McPike*, 3 Cush. 184; 1 Whart. C. L. § 681.

<sup>2</sup> 1 Greenl. Ev. § 214, 215, 219; 1 Whart. C. L. § 683, 685, 686, 687; 1 Chit. C. L. 570, and Perkins' note; *Moore*, C. L. § 939; *Commonwealth v. Knapp*, 10 Pick. 490.



the same offense, or as principal and accessory, or where one is indicted and the other voluntarily becomes a witness in the trial against his associate. In popular phrase he becomes in such case "a State's evidence." It is borrowed from the old English doctrine of approvement, now obsolete, which never has formed any part of the American common law. In such case, if he made confession, but did not discover the whole truth, or if the jury did not believe him and convict his accomplices, he was himself convicted and punished upon his own confession.<sup>1</sup>

In England, if one of several guilty parties confesses and is used by the government as a witness, he is recommended to the government for mercy by the Court, and ordinarily, though not always, with effect.<sup>2</sup>

In this country whether an accomplice or co-defendant in a criminal trial shall escape punishment by volunteering to become "State's evidence," depends upon the arrangement he is able to make with the prosecuting officer, though it is generally implied that, if he voluntarily and in good faith discloses the facts within his knowledge and the prosecution accepts it for the purpose of using it as evidence, no judgment shall be rendered against him for the part he took in it. But if under such an understanding he makes a full disclosure to the prosecution, who then places him upon the stand as

<sup>1</sup> *Rex v. Rudd*, Cowp. 335; 1 Bish. Cr. Proc. § 1074; 1 Chit. C. L. 603; *Commonwealth v. Knapp*, 10 Pick. 494.

<sup>2</sup> 1 Chit. C. L. 604; *Commonwealth v. Knapp*, 10 Pick. 493.

a witness, and he fails to testify, the prosecution is relieved from all obligation to interpose, and he may be convicted upon his own confession previously made. And this assurance of protection is often formally extended to a co-defendant or accomplice by the prosecution, if he will testify to the facts within his knowledge. In England as well as Massachusetts those who are admitted as witnesses for the government may rest assured of their lives if they perform their engagements.<sup>1</sup>

If a party on trial voluntarily becomes State's evidence, he thereby waives all right to object to answering questions implicating himself, if they bear upon the issue to be tried.<sup>2</sup>

Although the testimony of an accomplice, if unsupported, is always received with great caution, and courts and juries are reluctant to convict thereon, it is competent for the jury to find a verdict upon such evidence, if they believe it to be true.<sup>3</sup>

Confessions cannot be admitted as evidence

<sup>1</sup> 1 Chit. C. L. 570*a*, and Perkins' note; *Commonwealth v. Knapp*, 10 Pick. 491-495; *Foster v. Pierce*, 11 Cush. 437.

<sup>2</sup> *Hamilton v. People*, 13 Am. Law Reg. (N. S.) 685; 1 Bish. Cr. Proc. § 1083; *Commonwealth v. Price*, 10 Gray, 476.

<sup>3</sup> 1 Chit. C. L. 605; *Commonwealth v. Bosworth*, 22 Pick. 397; *Commonwealth v. Price*, 10 Gray, 472; [*The People v. Dyle*, 21 N. Y. 578; *Dunn v. The People*, 29 N. Y. 523; *Lindsay v. The People*, 63 N. Y. 143; *Gray v. The People*, 26 Ill. 344; *Cross v. The People*, 47 Ill. 153. *Contra Ray v. The State*, 1 G. Greene, 316; *Johnson v. The State*, 4 G. Greene, 65; *The State v. Clemens*, 38 Iowa, 257; *The State v. Howard*, 32 Vt. 380].

against any person but him who makes them, not even against an accomplice.<sup>1</sup>

If a confession cannot be used because improperly obtained, and any facts are thereby obtained which are independent of the confession, they may be made use of on the trial, as where the defendant in his confession stated where a certain weapon might be found, and upon search made, it was found, the prosecution was allowed to show the fact of the finding.<sup>2</sup>

The character of a party upon trial, good or bad, is often an important consideration in determining the question of his guilt. The defendant may offer evidence of this, and by so doing opens the full inquiry into it to the prosecution. But it cannot be done by the prosecution unless the defendant opens the inquiry, and only in rebuttal of the defendant's evidence. But this inquiry is restricted to general character, and is not allowed to go into particular facts.<sup>3</sup> And if the defendant opens the inquiry, the prosecution may not only show what his character

<sup>1</sup> 1 Chit. C. L. 571, and Perkins' note; *Morrison v. The State* 5 Ohio, 439.

A different rule prevailed in the English courts formerly, as was illustrated in the trial of *Somerset* for the murder of *Overbury*. Salmon's *Rev. State Trials*, 67.

<sup>2</sup> *Commonwealth v. Knapp*, 9 Pick. 511; 1 Chit. C. L. 572, and Perkins' note.

<sup>3</sup> 1 Chit. C. L. 575, and Perkin's note.

[In all criminal cases, whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner. *Jupitz v. The People*, 34 Ill. 516; *Conkwright v. The People*, 35 id. 204; *Hopps v. The People*, 31 id. 385; *Walsh v. The People*, 65 id. 58; *Moore*, C. L. § 89.]

was at and prior to the time of the alleged offense, but what it has been since, on the ground that the descent from virtue to crime is gradual, and such evidence may help to show that he had already begun that descent when the act was committed.<sup>1</sup>

So, the general character of a witness for truth may be inquired of by the party against whom he is called, with a view of impeaching the value of his testimony. But it must be confined to his general character for truth.<sup>2</sup>

It is often necessary, in making proof against the defendant, to refer to writings, and to show their contents. This may be done by producing the papers themselves, or in certain cases, by proving their contents by the oral testimony of witnesses who have seen and read them. If the paper, whose contents it is proposed to prove, is in the hands of the defendant, before the prosecution can call witnesses to its contents, the defendant must be notified to produce it on the trial. If he fails to comply with this notice, the prosecution may prove its contents by secondary evidence. So, if the paper is charged by the indictment to be wrongfully in the hands of the defendant, as by larceny, its contents may be shown *aliunde*, without first giving notice to produce it. Such would be the case upon a trial for larceny in stealing a bank bill.<sup>3</sup>

Another point in the matter of evidence in rela-

<sup>1</sup> Commonwealth v. Sacket, 22 Pick. 394.

<sup>2</sup> 1 Greenl. Ev. § 461.

<sup>3</sup> 1 Chit. C. L. 579, and Perkins' note; People v. Holbrook, 13 John. 90; 1 Bish. Cr. Proc. § 433.

tion to written papers, is that of their genuineness. The rule is substantially the same in England and most of the United States, though differing in some respects. Any one who has seen the person write, whose name is subscribed to a paper, may testify as to his belief of its being genuine, or otherwise. So, any one who has addressed letters to him and has received letters in reply to these, purporting to be from him, may testify to his belief of the genuineness of the handwriting in question. And to this extent it is believed there is no diversity of opinion between these courts.<sup>1</sup>

While the competency of the testimony of experts in handwriting in establishing the genuineness or otherwise of handwriting in the trial of a criminal case, is admitted, the mode of examining such witnesses as to the sources of their knowledge or opinion, is somewhat different in different States. It is at best a mere expression of an opinion, because it is assumed that the witness does not know how the fact is from his personal knowledge of it. And it must be at the best a very unsafe and unsatisfactory mode of proof. In England, while they allow an expert to testify to his belief as to a given writing being in a disguised hand, they do not allow him to compare the one in question with another which is proved or admitted to be genuine. But in Massachusetts, the courts allow the comparison to be made, and an opinion to be formed and testified of by this comparison.<sup>2</sup> In New York, however, a

<sup>1</sup> 1 Chit. C. L. 580; 1 Greenl. Ev. §§ 576, 577.

<sup>2</sup> 1 Greenl. Ev. § 576-580; 1 Chit. C. L. 582, and Perkins'

comparison [of instruments not properly in evidence for other purposes] is not allowed to aid an expert.<sup>1</sup> [In Illinois the rule was at first laid down broadly that the genuineness of handwriting could not be proved or disproved by allowing the jury to compare it with the handwriting of the party, proved or admitted to be genuine;<sup>2</sup> and that not even experts could be permitted to prove the genuineness of a signature by comparing it with another signature admitted to be genuine.<sup>3</sup> But in the subsequent case of *Brobston v. Cahill*,<sup>4</sup> the rule as stated in *Jumpertz v. The People*, was qualified and held not to be applicable to cases where the writing, with

note; *Moody v. Rowley*, 17 Pick. 490; *Commonwealth v. Webster*, 5 Cush. 295; *Richardson v. Newcomb*, 21 Pick. 315. See, also, *Commonwealth v. Williams*, 105 Mass. 63.

<sup>1</sup> *People v. Spooner*, 1 Denio, 343; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Ellis v. The People*, 21 How. Pr. 356.

<sup>2</sup> *Jumpertz v. The People*, 21 Ill. 375, 408; *Pate v. The People*, 3 Gilm. 660; *Putnam v. Wadley*, 40 Ill. 346.

<sup>3</sup> [*Kernin v. Hill*, 37 Ill. 209. See this case criticised by Mr. Denslow in a note to said case on page 209 of Callaghan & Company's edition of said volume. In Michigan witnesses are allowed to compare the writing in question with the appeal bond or other papers forming a part of the record in the same cause and admitted to be signed by the defendant, or with any other writing legitimately introduced into the case under the issue, in order to judge of the genuineness of the writing to be proved; but disputed papers which do not belong in the cause, and are not involved in the issue, cannot have their genuineness made a question of inquiry, and cannot, therefore, be made a basis of comparison for either witness or jury. *Vinton v. Peck*, 14 Mich. 287; *Tiff. Cr. L.* 451. The cases and the different rules upon this subject will be found in 1 Greenl. Ev. § 581, note.]

<sup>4</sup> 64 Ill. 356.

which it is sought to compare the one alleged not to be genuine, is properly in evidence, and pertinent to the case.]

As a general rule, with very few, if any, exceptions, the testimony of witnesses in criminal trials must be given orally in open court. In Massachusetts, however, in favor of the defendant, who desires the testimony of a witness who is without the jurisdiction of the court, he is permitted to take his deposition upon a commission from the court upon interrogatories and cross-interrogatories, and to use this in evidence upon his trial. But it cannot be done by the prosecution, since it is the privilege of the defendant under the constitution to meet the witnesses against him face to face.<sup>1</sup>

Questions of some difficulty often arise which the courts have to determine as to the persons who are competent to be witnesses. And one class of these is young persons. The question depends upon the capacity rather than the age; for there is no fixed age before which one is regarded as an incompetent witness. If the Court upon examination of the

<sup>1</sup> Mass. Gen. Stat. c. 172, § 32; Bill of Rights, Art. 12. See Moore, C. L. §§ 157, 881, *et seq.*

[In cases of misdemeanors, it is held, that the depositions of absent witnesses may be taken by consent; and if the attendance of material witnesses for the defendant cannot be procured, he may offer to join in a commission to take their depositions, and the Court, in its discretion, may, in case the other party refuses to join in the commission, continue the cause from term to term, until the other party does join; and when the offer is accepted, the cause will be continued till the next term. *Richardson v. The People*, 31 Ill. 170; Moore, C. L. § 882.]

witness is satisfied that he understands the obligation of an oath, it admits him. A witness of the age of five years has been admitted.<sup>1</sup>

In respect to insane persons being competent to be witnesses, the ancient law seems to have excluded them. But the rule of modern times seems to limit this exclusion, to the matters upon which the witness is under an insane delusion, leaving him competent as to all other matters. The marginal note of a recent case thus states the law upon this point: "A lunatic patient, who had been in confinement in a lunatic asylum, and who labored under the delusion, both at the time of the transaction and the trial, that he was possessed of twenty thousand spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligation of an oath and to believe in future reward and punishment, was called as a witness on a trial for manslaughter, and it was held, that his testimony was properly received in evidence; and that when a person under an insane delusion is called as a witness, it is for the judge, at the time, to say whether he is competent to be a witness, and it is for the jury to judge of the credit that is to be given to his testimony."<sup>2</sup>

Another class of persons have been held incompetent to be witnesses, by reason of being insensible

<sup>1</sup> 1 Greenl. Ev. § 367; 1 Chit. C. L. 590, and Perkins' note.

<sup>2</sup> 1 Chit. C. L. 589, and Perkins' note; 1 Greenl. Ev. § 365, and note; *Reg. v. Hill*, 15 Jur. 470; 14 Law Reporter, 141; *Kendal v. May*, 10 Allen, 63, 64.



to the sanction of an oath, from a disbelief in the existence of a God who takes cognizance in a future life of what is done in this. The law assumes that there are and may be atheists; but as the fact can be established by their own declarations alone, and the number, if there are any, is so few, and a strong disinclination prevails to take cognizance of the religious opinions of the citizen, there was a struggle against this rule of law, which has at last rendered such persons competent as witnesses in Massachusetts. Instead of taking an oath, such as is required to be taken by most witnesses, the form is an affirmation to tell the truth under the pains and penalties of perjury. The credibility of such testimony is to be judged of by the jury.<sup>1</sup>

But from the time of the decision of *Omichund v. Baker* it was not necessary that a witness should believe in the Christian religion in order to be a competent witness. A Jew, Mohammedan or Gentoo is admitted to testify upon being sworn in the manner which is recognized by their respective faiths as binding upon their consciences, as a Jew upon

<sup>1</sup>*Thurston v. Whitney*, 2 Cush. 104; *Hanscom v. Hanscom*, 15 Mass. 184; Mass. Gen. Stat. c. 131, § 12; 1 Greenl. Ev. § 368-370; *Commonwealth v. Hill*, 10 Cush. 580, 582; 1 Chit. C. L. 591, and Perkins' note.

[It is provided by constitutional provision in Michigan, that no person shall be "rendered incompetent to be a witness on account of his opinions on matters of religious belief," (Const. Art. 6, sec. 34); and similar constitutional provisions exist in the States of Iowa, Minnesota, Oregon, Wisconsin, Arkansas, Florida, Missouri, California, Indiana, Kansas, Nebraska, Nevada, Ohio and New York. See Cooley's Const. Limitations, 478, and note.]

the Pentateuch, a Mohammedan upon the Koran, and the like.<sup>1</sup>

This question of competency has no reference to the forms of administering oaths, which vary in different States and in the same States, to meet the cases of different witnesses, the form adopted being such as most effectually appeals to the conscience of the witness. Thus, in the New England States the form is that of Scotland, by holding up the hand.<sup>2</sup> In other States the witness kisses the Bible. Even in Massachusetts the form as applied to Catholics, is to be sworn upon the Evangelists, according to the Douay version. Quakers and others who have scruples of taking an oath, affirm upon the perils of perjury. A Chinese holds a saucer in his hand, which he dashes in pieces upon concluding his oath.<sup>3</sup>

Another class of persons who are incompetent by the common law to testify, are husbands and wives, where the subject of inquiry involves the legal rights

<sup>1</sup> *Omichund v. Baker*, 1 Atk. 21, 48; 1 Greenl. Ev. § 28; 1 Chit. C. L. 591, and Perkins' note, 617.

<sup>2</sup> [So in Michigan, by holding up the right hand. 2 Comp. Laws, 1871, § 5960.]

<sup>3</sup> 1 Chit. C. L. 591, and Perkins' note, 616, 617; *Commonwealth v. Buzzell*, 16 Pick. 153; 1 Greenl. Ev. § 328; Mass. Gen. Stat. c. 131, § 12.

[In Illinois, it is provided that it shall be lawful to administer an oath in the following form: "The person swearing shall, with his hand uplifted, swear by the ever living God, and shall not be compelled to lay the hand on or kiss the gospels." Rev. Stat. 1874, 725, § 3. When the witness has conscientious scruples against taking an oath, he "may solemnly, sincerely and truly declare and affirm." Id. sec. 4.]

of the husband or wife for or against whom the witness is called. And this was carried so far as to exclude the testimony of a wife for a defendant who is tried with her husband. It is founded upon the idea of identity of interests, and excludes these as witnesses upon the same ground that a party himself is excluded.<sup>1</sup> The exception to this was when the wife sought protection of law against the personal violence or abuse of the husband, as was decided in Lord Audley's case; and the rule never extended to any but a lawful wife; one's living with another as a wife did not render her incompetent to testify against him.<sup>2</sup>

The change of the law in respect to the competency of a party in interest to testify in his own case, which has been adopted in England and in several of the States in our own country, has led to a material change in the law as to husbands and wives being admitted to testify for or against each other. In Massachusetts, every person may be a witness in his own case, whether civil or criminal, at his own election, nor is any one excluded from being a competent witness by reason of having been convicted of a crime, and any party may call and examine the adverse party in a suit as a witness, with the exception that neither husband nor wife shall be allowed to testify as to private conversa-

<sup>1</sup> 1 Greenl. Ev. § 334-336; 1 Chit. C. L. (Perk. ed.) 594, 595, and notes; *Commonwealth v. Shanks*, 7 Allen, 535.

<sup>2</sup> 1 Greenl. Ev. § 343; *Batthews v. Galindo*, 4 Bing. 610; *Commonwealth v. Murphy*, 4 Allen. 491; *Kelly v. Drew*, 12 Allen, 110.

tions with each other, nor shall either be compelled to be a witness on any trial upon an indictment, complaint or other criminal proceeding against the other.<sup>1</sup>

By the common law one who has been convicted of certain offenses which come within the category of *crimina falsa*, were excluded from testifying, which seems to be visiting the censure for such crime upon the innocent party who may need the testimony of such witness.<sup>2</sup> But the tendency of modern legislation, both in England and this country, is to do away with this rule and to leave the question one of credibility, and not of competency.<sup>3</sup>

A different rule has prevailed in different States as to the competency of one to testify, whose name is alleged to have been forged, in a trial of another for committing the forgery. In Massachusetts he was held competent. In Vermont, North Carolina and Connecticut, it was held otherwise. In Pennsylvania the rule is the same as in Massachusetts.<sup>4</sup> But as this depended upon the supposed interest of the witness in the matter at issue, it would seem to be no longer a question in the States where interest no longer excludes a person from being a witness.

<sup>1</sup> Stat. Mass. 1870, c. 393.

[See, also, Rev. Stat. Ill. 1874, p. 410, § 426; p. 488, §§ 1, 5; 2 Comp. Laws, Mich. 1871, §§ 5966-5969.]

<sup>2</sup> 1 Stark. Ev. 94; 11 Am. Jurist, 356; 1 Greenl. Ev. 372-376.

<sup>3</sup> Mass. Stat. 1870, c. 393; 2 Comp. Laws, Mich. 1871, § 5966; Rev. Stat. Ill. 1874, 488, § 1.

<sup>4</sup> 1 Chit. C. L. 597, and Perkins' note; Commonwealth v. Peck, 1 Met. 428.

An important rule is still in force which relates to communications between a client and his legal counsel, and how far the latter is excluded from testifying in respect to these. It involves questions of private faith and personal honor, as well as legal right. That counsel would not be permitted, if he were willing to disclose what is properly a confidential communication made to him by a client, if objected to, may be accepted as an elementary principle of evidence; and the instances of men within the category of legal counsel, being base enough to consent to disclose these, are so rare and infrequent, that it may be assumed that none will be made, except such as the law would require to be done. And among the rules upon this matter, one is, that the privilege of excluding such communications from being competent evidence belongs to the client, personally, and if he calls his counsel as a witness in respect to them, he is obliged, upon cross-examination, to answer all pertinent questions bearing upon the points upon which he has been examined by his client.<sup>1</sup>

In the next place, the communication must be made by the one as client to the other "in his pro-

<sup>1</sup> 1 Chit. C. L. 608; 1 Greenl. Ev. § 237, 238; *Foster v. Hall*, 12 Pick. 92, 93; *The People v. Barker*, 56 Ill. 299; *Wood v. Thornby*, 58 Ill. 464.

[So, the heir of the client may call for the testimony of the attorney. *Fessler v. Schriber*, 38 Ill. 172. It is not error to permit an attorney, as a witness, to answer a question the object of which is merely to ascertain whether the relation of attorney and client actually existed, not what was disclosed to him in that relation. *Leindecker v. Waldron*, 52 Ill. 283.]

fessional character, and with reference to professional business.”<sup>1</sup> It may be made by the client himself, or his agent or interpreter, or to the attorney directly or through his clerk. The communication must be of a professional character, in relation to matters on which the client wishes professional advice and direction. And it is limited to professional counsel, such as barristers, counselors, attorneys and solicitors, although when making the communication, the person making it supposed the one to whom he made it was a professional counselor. If, therefore, a client communicates facts to a student in the office of a counselor, supposing him to be the attorney or counselor, the clerk may be compelled to disclose these. So, he may, if he overhear the communication made by the client to his counsel.<sup>2</sup> But the exemption from testifying extends to an interpreter through whom the communication to the counselor is made.<sup>3</sup>

But being the counsel for a person upon trial does not exempt him from being called to testify to facts within his knowledge not gained by professional communication.<sup>4</sup>

<sup>1</sup> [Where an attorney is consulted merely as a friend, and where neither he, nor the person consulting with him, supposes the relation of attorney and client to exist between them, the communications are not entitled to the sanction of secrecy extended to communications professionally made. *Goltra v. Wolcott*, 14 Ill. 89.]

<sup>2</sup> 1 Greenl. Ev. § 239-240; 1 Chit. C. L. 606, 607, and Perkins' note; Roscoe, Cr. Ev. 177; *Barnes v. Harris*, 7 Cush. 576; *Foster v. Hall*, 12 Pick. 89, and cases cited.

<sup>3</sup> 1 Chit. C. L. 606. Roscoe, Cr. Ev. 175; 1 Greenl. Ev. § 239.

<sup>4</sup> *Hatton v. Robinson*, 14 Pick. 416; [*Chilicothé F. R. & B.*

Another view of this subject presents this question, how far the client is bound to disclose advice or opinions given him by his counsel. And it now seems to be settled that the client can no more be compelled to disclose communications made to him by his counsel, than the counsel would be to disclose what had been communicated to him by the client.<sup>1</sup> Lord Cottenham says: "Parties are to be at liberty to communicate with their professional advisers with respect to matters which become the subject of litigation, without restriction and without the liability of being afterwards called on to produce or discover what they shall so have communicated." <sup>2</sup>

It may be added that no change of time or circumstances short of the voluntary act of the client, can release the counsel from his obligation to withhold all communication of matters disclosed to him in his professional capacity.<sup>3</sup>

But this privilege of exemption does not extend to communications made to priests, physicians or any other persons than professional counsel, however strong the confidence under which it was made.<sup>4</sup>

*Co. v. Jameson*, 48 Ill. 281, where it was held that it should appear that the attorney derived his knowledge from the relation of attorney and client before it is excluded.]

<sup>1</sup> 18 Law Rep. 61; 1 Greenl. Ev. § 240.

<sup>2</sup> *Nias v. N. & E. R. R. Co.* 3 Myl. & Cr. 355, 357; *Minet v. Morgan*, L. R. 8 Ch. Ap. 361, 367; *Hamilton v. People*, 22 Am. Law Reg. 685.

<sup>3</sup> 1 Greenl. Ev. § 243.

<sup>4</sup> 1 Greenl. Ev. §§ 247, 248; 1 Chit. C. L. 607; *Commonwealth v. Drake*, 15 Mass. 162; *Commonwealth v. Knapp*, 9 Pick. 496.

In New York it has been held that a confession made to a catholic priest need not be disclosed, while the contrary is held in Pennsylvania<sup>1</sup>.

In respect to the mode of compelling the attendance of witnesses, it is only necessary to add to what has before been said,<sup>2</sup> that it is done by proper notice to them, by serving a *subpoena* issued from the court requiring their attendance, and upon their failure to attend, to apply to the Court for a *capias*, which is a process directed to an officer, requiring him to bring the witness into court. But in order to obtain this, the party summoning the witness must have tendered him his lawful fees for his travel and one day's attendance, unless he is summoned on behalf of the State.<sup>3</sup>

If the witness be confined in prison at the time

<sup>1</sup> 1 Chit. C. L. 607, and Perkins' note; *Simons v. Gratz*, 2 Pen. & Watts. 416.

[It is provided by statute in Michigan that "no minister of the gospel, or priest, of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." 2 Comp. Laws, 1871, § 5942. The same protection is also extended to information acquired by physicians or surgeons in their professional character, and which was necessary to enable them to prescribe or do any act for the patient, as physician or surgeon. *Id.* sec. 5943.]

<sup>2</sup> P. —.

<sup>3</sup> 1 Greenl. Ev. §§ 309, 311, 319.

[By statute in Michigan, it is not necessary to pay or tender any fees to any witness subpoenaed, either on behalf of the people or the defendant, in order to compel his attendance. 2 Comp. Laws, 1871, § 7906; Tiff. C. L. 214, 497; and the rule appears to be the same in this respect in Illinois. Rev. Stat. 1874, p. 410, § 427, p. 520, § 47.]



when his presence is required, the Court is authorized to issue a precept called a writ of *habeas corpus ad testificandum*, by virtue of which whoever has him in custody is required to bring the witness into court to testify, and when he has done so, to return him to prison. But this is not to be confounded with the great writ of *habeas corpus*, which is designed to liberate a prisoner who is unlawfully held in confinement or restraint.<sup>1</sup>

While the law is thus strict in compelling the attendance of witnesses, it is careful to protect them from suffering loss or injury by obeying its summons. It accordingly relieves them from being arrested upon any civil process while going to, remaining at, or returning from, the place of trial to the attendance upon which they have been summoned. So that, if a witness comes from without the State to attend at a trial, he has a reasonable time in which to reach the court, and in which to return to his home after the trial has closed, during which he is not a subject of arrest on a civil process. The Court summoning him, if desired, will grant him a writ of protection which, if exhibited to an officer, will prevent his arrest. But this is not necessary to relieve him from arrest, if actually made, provided he applies to the Court by whose precept he was summoned as a witness. In such case the Court will order him to be discharged from arrest.<sup>2</sup>

<sup>1</sup> 1 Greenl. Ev. § 312; 1 Chit. C. L. 610.

<sup>2</sup> 1 Greenl. Ev. § 316, 318; 1 Chit. C. L. 615.

In examining witnesses it is competent for the Court, upon application of either party to order that the witnesses called against him should be examined separately and that all who are to testify upon the same side should be excluded from the court room while one of them is undergoing examination, and this is rarely denied when asked for.<sup>1</sup>

There does not seem to be any uniform mode of dealing with a witness who disobeys this rule by remaining in court while another is testifying. It seems to be a matter within the discretion of the judge whether to admit or reject his testimony. The right of rejecting his testimony is rarely exercised, though it is held by all the courts to be a contempt for which the witness may be punished.<sup>2</sup>

Every witness may refuse to testify to facts which will criminate, or tend to criminate, himself, so as to subject him to penalties, and the counsel or the Court often suggest to him the right he has to protect himself by declining to answer. Nor is he bound to answer any question, if it will involve him in disgrace, shame or reproach, although it do not amount to a specific offense.<sup>3</sup> It is given as a rule in the English courts, that a witness may be

<sup>1</sup> 1 Chit. C. L. 618; 1 Greenl. Ev. § 432; Moore, C. L. § 930.

<sup>2</sup> 1 Greenl. Ev. § 432; 1 Chit. C. L. 618, Perkins' note; Moore, C. L. § 930; *Atty. Gen. v. Bulpit*, 9 Price, 4; *Podree v. McWilliams*, 6 Bing. 683; *Beamon v. Ellice*, 4 C. & P. 585; *Rex v. Colby*, Mood. & Malk. 329.

<sup>3</sup> [The authorities upon this question are involved in some conflict. The rule is laid down by the Supreme Court of Illinois, following Mr. Greenleaf, that where the question is asked respecting a matter collateral to the issue, or with a view to impair the credibility of the witness (under the latitude allowed

asked whether he has not stood in the pillory or been charged with a felony, leaving him to answer or not at his election. But the American rule seems to exclude such an inquiry, since, if he has been, there is record evidence to show it.<sup>1</sup>

But a witness will not be excused from testifying if the effect is merely to subject him to pecuniary loss.<sup>2</sup> Nor will a witness be excused from testifying as to an illegal act in which he has taken a part, if he does not, by so doing, subject himself to criminal prosecution. As, for example, one who has purchased liquor unlawfully sold, may be compelled to testify to the fact.<sup>3</sup>

in a cross-examination), he is not bound to give testimony that will directly tend to disgrace him. But where the transaction forms any part of the issue to be tried, the witness must testify, however strongly his testimony may reflect on his character. *Weldon v. Burch*, 12 Ill. 374, approving the rule as laid down in 1 Greenl. Ev. § 454; 2 Phil. on Ev. (5th Am. ed.) \*939; and Cowen & Hill's note, No. 593. And such appears to be the weight of authority. "It is, however," says Mr. Greenleaf, (Vol. 1, § 456) generally conceded, that where the answer, which the witness may give, will *not directly and certainly show his infamy*, but will *only tend to disgrace* him, he may be compelled to answer." ]

<sup>1</sup> 1 Chit. C. L. 620; 1 Greenl. Ev. § 457.

[In Michigan, however, it is settled that a witness may, without producing the record of his conviction, be asked on cross-examination, whether he has ever been confined in the State's prison, *Wilbur v. Flood*, 16 Mich. 40; or, whether he has not been indicted and convicted of a criminal offense. *Clemens v. Conrad*, 19 Mich. 170. He can, however, only be directly attacked by record evidence of his conviction. *Dickinson v. Dustin*, 21 Mich. 561.]

<sup>2</sup> *Bull v. Loveland*, 10 Pick. 9.

<sup>3</sup> *Commonwealth v. Willard*, 22 Pick. 476.

*Argument of Counsel—Right of Jury to render a General Verdict.* There is little to be added as to the manner in which counsel may address the jury in any particular case after the evidence has been closed. But it may be proper to refer to the conflict of opinion which has prevailed at times as to how far counsel are at liberty to address the jury upon the questions of law which arise in a trial. This of course depends mainly upon the question how far the jury are at liberty to interpret and apply the law, if in so doing they hold different opinions from the Court who tries the case. This right on the part of the jury is maintained by a distinguished lawyer of Virginia in an elaborate article in the *American Jurist*. And the Court of Massachusetts, while they hold that the defendant in a criminal trial has the right to argue both points of law and fact before the jury, hold that the jury are in duty bound to accept the rulings of the Court in matters of law, as binding upon them in forming their judgment.<sup>1</sup> This matter is attempted to be regulated by statute in Massachusetts by giving the jury a right, in their discretion, to render a general verdict as to the law and the fact involved in an issue before them.<sup>2</sup> But the Court, two judges dissenting, held that, notwithstanding this statute, the jury has no right to render a verdict upon matters

<sup>1</sup> 6 Am. Jur. 237-267; *Commonwealth v. Porter*, 10 Met. 263; 3 Whart. C. L. §§ 3093, 3094, 3101.

<sup>2</sup> [By statute in Illinois, also, juries in all criminal cases are judges of the law and the fact. Rev. Stat. Ill. 1874, 411, § 431.]

of law, adverse to the instructions of the Court, because, under the Constitution, the Legislature had no right to confer such a power.<sup>1</sup>

In this connection it is proper to refer to the change in this respect in the trial of indictments for libel. Before the famous trial of the Dean of St. Asaph, for publishing an essay of Sir William Jones on the principles of government, it was held by the English judges that the only question in such cases upon which the jury had a right to pass, was the fact of publication by the defendant and the truth of the *innuendoes*, leaving it to the Court to decide whether, if published by him, it was a libel. This was followed by the courts of Massachusetts. But now, both in England and here, the whole matter is open for the jury to pass upon by a general verdict, or they may return a verdict as to publishing, leaving the Court to decide whether the matter published is libelous.<sup>2</sup>

The difference in effect of general and special verdicts is often material. If the verdict is general, it assumes everything alleged, which was necessary to constitute the offense, to be true, including place, &c.; whereas, if it be special, and do not expressly find the act to have been done within the county, it becomes an immaterial finding, and

<sup>1</sup> Gen. Stat. c. 172, § 15; *Commonwealth v. Anthes*, 5 Gray, 185-303. See, also, as to other States, 1 Bish. Cr. Proc. § 984.

<sup>2</sup> *King v. Dean St. Asaph*, 3 Term, 428, note; 32 Geo. III, c. 60; *Commonwealth v. Blanding*, 3 Pick. 304; Gen. St. Mass. c. 172, § 15; [Rev. Stat. Ill. 1874, 411, § 431; Const. Mich. Art. 6, § 25; Cooley's Const. Lim. 460.]

amounts to neither an acquittal nor a conviction.<sup>1</sup>

*Publication of Proceedings—Contempts.* Although by the theory of trials by courts, they are to be open to the public, and the facts therein disclosed may be published as a matter of right, courts, at times, have exercised the power of restricting the publication of proceedings had before them in the newspapers and public journals for a longer or shorter period of time, when, in their judgment, the rights of other suitors would be thereby hazarded. The exercise of this power, though modern in its origin, seems to have become too well settled to be effectually questioned. And if the rule is violated, the courts take cognizance of it by punishing the one who makes the publication, for contempt. In *Rex v. Clement*, growing out of the trial of Thistlewood and others for high treason, where several were to be tried upon substantially the same evidence, the Court forbade any publication of the proceedings until all the trials were concluded. The printer of a newspaper was fined £500 for disobeying this order. It was stated on the hearing of that case, that this power was first exercised in 1806, in the trial of Lord Melville. Similar orders have been adopted in respect to the proceedings in court in more or less of the States of the United States.<sup>2</sup>

<sup>1</sup> 1 Chit. C. L. 644, 645; *Commonwealth v. Call*, 21 Pick. 509.

<sup>2</sup> *Rex v. Clement*, 4 B. & Ald. 218.

[See *Storey v. The People*, 79 Ill. 45, libel of grand jury in relation to an act already done, not punishable as a contempt;

This power of punishing for contempt is incident to all courts having jurisdiction to try causes, as well as to deliberative bodies acting in matters of government, like the houses of Parliament and houses of Congress.<sup>1</sup>

Among the persons who are liable for contempt of court are attorneys, solicitors, sheriffs, bailiffs, parties to suits, witnesses and jurors. And in one case Kent, C. J., said: "Every illegal and unauthorized interference with the process or proceedings of a court is clearly a contempt of such court."<sup>2</sup> In an English case the Court fined one counsel three times for contempt during his address to the jury. And Best, C. J., says: "No man who pretends to any knowledge of the law can doubt that a judge of a court of record has authority to fine and imprison for any contempt committed in the face of the Court. From the earliest period of our history this authority has been exercised." In some of the States it is limited to acts done in the presence of the Court.<sup>3</sup>

If the contempt is committed in presence of the Court, they may at once fine or imprison and enforce this by a written warrant or *mittimus*. If other-

The People v. Wilson, 64 Ill. 195, libel upon the Supreme Court in reference to a case still pending before it, punished as a contempt.]

<sup>1</sup> *Burdett v. Abbot*, 14 East, 1; *Anderson v. Dunn*, 6 Wheat. 204; *Cooley*, Const. Lim. 133.

<sup>2</sup> *Yates v. Lansing*, 9 John. 398; *Case v. Johnson*, 4 John. 363.

<sup>3</sup> *Rex v. Davidson*, 4 B. & A. 329.

[See *Storey v. The People*, and *The People v. Wilson*, *supra*.]

wise, the Court issues an order upon the offending party to show cause why an attachment should not issue, or if it be a gross case, an attachment issues at once, by which he is brought into court and examined, and if he do not clear himself upon oath, and is found guilty of contempt, he is punished.<sup>1</sup>

*Charge to the Jury.* If it is assumed that the trial has proceeded to the close of the arguments or summing up by the counsel or the parties themselves, the next step in order is for the judge who presides at the trial to charge or instruct the jury as to performance of their duty in considering the evidence in connection with the law, and the finding and return of their verdict. But with the various rules of the courts of different States, it is difficult to limit and define how this is to be done. It is obviously a matter of great importance to the defendant on trial; for with the respect which the jury are always inclined to pay to the opinions and directions of the Court, if the Court see fit to instruct them as to the degree of credit to be given to any witness, or as to what conclusions they should arrive at as to the matters submitted to them, it is practically invading the province of the jury in determining the question of the defendant's guilt

<sup>1</sup> 4 Black. Com. 283-288; 1 Chit. C. L. 631.

[See *ex parte* Petrie, 38 Ill. 498; *Petrie v. The People*, 40 Ill. 334, to the point that in the case of an alleged contempt in disobeying an order of Court, no notice of the proceeding is necessary, before the attachment issues, the attachment in such case being merely a process to bring the defendant before the Court to show cause why he should not be punished for a contempt. See, also, *ex parte* Langdon, 25 Verm. 682.



or innocence. To guard against this, courts are prohibited by statute in some of the States from charging the jury as to whether a fact has been proved or not.<sup>1</sup>

The rule as laid down by the statute of Massachusetts is, "the Courts shall not charge juries with respect to matters of fact, but may state the testimony and the law."<sup>2</sup> This is probably another form of saying that the judge shall not usurp the province of the jury. But it does not say he shall not state his own impressions upon what is testified of, or using fair argument to satisfy the jury that a certain fact has been proved; though the fact of using such an argument is little short of instructing the jury how they should find. This matter is partially discussed in 3 Am. Jur. 328.

In Maryland it is held that if the evidence is so slight and inconclusive that a rational mind could not draw the conclusion sought to be derived from it, it is the duty of the judge to instruct the jury accordingly.<sup>3</sup> It is expressly claimed by the Court of Massachusetts, that the judge has the right to express to the jury his own opinion as to the weight of the evidence.<sup>4</sup> And a similar doc-

<sup>1</sup> 1 Bish. Cr. Proc. § 981.

<sup>2</sup> Gen. St. Mass. c. 115, § 5.

[In Illinois the statute provides that "the Court, in charging the jury, shall only instruct as to the law of the case:" Rev. Stat. 1874, 781, § 52; and such instructions, in cases civil and criminal, are required to be in writing: § 53.]

<sup>3</sup> *Morris v. Brickley*, 1 Harr. & Gill, 109.

<sup>4</sup> *Commonwealth v. Child*, 10 Pick. 256.

[Otherwise in Illinois. *Bill v. The People*, 14 Ill. 432; *Fish-*

trine is maintained in Maine, New York and Vermont, provided the judge does not give it the form of a direction as a matter of law.<sup>1</sup>

*Verdict.* If, in instructing the jury, the judge states the law erroneously, objection may be taken by the defendant by formally excepting to the same, if it is to his injury, in the manner hereafter explained. But ordinarily the only thing that remains after the instructions from the judge, is to put the jury in the charge and custody of an officer sworn to keep them in some safe and secure place, that he will not suffer any other person to speak to them, or speak to them himself, except to ask them if they are agreed.<sup>2</sup> As soon as they have agreed they are returned by the officer into court, where their verdict is declared and recorded, and they are thereupon discharged.

But the party is not always satisfied to receive the verdict as given by the foreman, who speaks for the jury, and desires to have each juror inquired of separately. This is called "polling the jury." If any juror does not assent to the verdict, the jury are sent out for further deliberation, till they do

*er v. The People*, 23 Ill. 283; *Andrews v. The People*, 60 Ill. 354. See the cases *pro* and *contra* collected in Moore, C. L. § 959.]

<sup>1</sup> 8 Greenl. 59; *People v. Rathbun*, 21 Wend. 509; 11 Verm. 25, 151.

[<sup>2</sup> See Rev. Stat. Ill., 1874, 411, § 435. In a case of felony it is error to omit to swear the officer having charge of the jury. *McIntyre v. The People*, 38 Ill., 514; *Lewis v. The People*, 44 Ill., 452.]

agree or are discharged because they cannot agree.<sup>1</sup> While the polling of the jury is allowed in South Carolina, Illinois and New York, it has never been in Massachusetts either in civil or criminal cases, nor in Maine.<sup>2</sup>

The ordinary mode of delivering a verdict in all the States is by the clerk, on the jury's coming into court, asking them if they are agreed, and, if this is answered in the affirmative, it is asked who shall speak for them, when some one of the panel answers, "The foreman." Then the clerk says, "What say you, Mr. Foreman, is the prisoner at the bar guilty, or not guilty?" He then answers, "guilty" or "not guilty," as the case may be, and the clerk repeats, "so you say, Mr. Foreman, so say you all," and their silent assent becomes the verdict of the whole panel.<sup>3</sup>

In no case, except in trials for misdemeanors, can a verdict in a criminal case be rendered in the absence of the defendant. In misdemeanors he may be present by his attorney.<sup>4</sup>

If a juror has once agreed with his fellows in a

<sup>1</sup> Chit. C. L. 635, and Perkins' note.

<sup>2</sup> *Ropp v. Barber*, 4 Pick. 239; *Commonwealth v. Roby*, 12 Pick. 496; *Nomaque v. The People*, Breese 111; s.c. *Beecher's Breese*, 145; *State v. Harden*, 1 Bail. 3; *Fellowe's case*, 5 Greenl. 289; *Commonwealth v. Costley*, 118 Mass. 28; 1 Chit. C. L. 635, and Perkins' note; *Moore*, C. L. § 985.

<sup>3</sup> See Rev. Stat. Ill. 1874, 781, § 57.

<sup>4</sup> 1 Chit. C. L. 636.

[Chitty qualifies the term "misdemeanors" used in this connection, by the word "inferior." See, also, 1 Bish. Cr. Proc. § 273; *Moore*, C. L. § 932, and cases cited.]

verdict, and when it was announced in Court, assented to the same, he is never admitted after that, either in England or this country, to impeach it by any statements afterward.<sup>1</sup>

It is competent for the jury to find a verdict of not guilty, as to a part of the charge, though they find the defendant guilty, or cannot agree as to the other parts. So, they may acquit one or more of the defendants charged in the same indictment though they find the others guilty or cannot agree as to them. In both these cases so far as they do agree in finding a verdict, it is an effectual bar so far as it extends to the defendants being held to a second trial.<sup>2</sup>

*Custody of the Jury — Effect of Separation.*  
A diversity prevails as to the mode and degree of strictness with which the jury is to be kept after they have been put in charge of an officer, and the same inquiry extends to how they shall be kept after they are impaneled during the trial. In capital trials the rule seems to be uniform to keep the jury together, and not allow them to separate, or have communication with any one outside of the panel till they are discharged. But it is customary in this country, in other than capital trials, to allow the jury to separate under a charge not to speak to any one, or allow any one to speak to them upon the subject of the trial, until they are finally charged with the case, and sent out to find a verdict. And

<sup>1</sup> 1 Chit. C. L. 655, and Perkins' note.

<sup>2</sup> 1 Chit. C. L. 638, 640; *Commonwealth v. Wood*, 12 Mass. 313.

a juror cannot leave the presence of the Court in a capital trial, except in the charge of an officer.<sup>1</sup>

But the rule does not seem to be absolute that a separation of a jury would necessarily avoid their verdict. In the following cases the Court held it a matter of discretion on the part of the Court whether to accept a verdict or not from a jury who had separated after having been charged, before they had agreed upon it.<sup>2</sup> But in New York the Court granted a new trial because the jury separated after having agreed upon their verdict, but before they had rendered it, and this seems to be the rule in that State in criminal cases.<sup>3</sup> And a rule prevails whereby such verdicts are excluded in Virginia and Tennessee.<sup>4</sup> In Pennsylvania the Court granted a new trial where the jury in a capital case, separated by consent of the parties.<sup>5</sup> [In Illinois the rule in capital cases is, that the Court must grant a new trial, if the jury, during the progress of the trial, separate without the authority of the Court, with the consent of the accused and the attorney for the people, unless such separation was the result of

<sup>1</sup> 1 Chit. C. L. 628, 634; *McKinney v. The People*, 2 Gilm. 553; *Jumpertz v. The People*, 21 Ill. 411; *Russell v. The People*, 44 Ill. 508; *State v. Prescott*, 7 N. H. 288; *People v. Douglass*, 4 Cowen, 26; *People v. Ransom*, 7 Wend, 423; 1 Bish. Cr. Proc. § 995; *Moore*, C. L. § 923, and cases cited.

<sup>2</sup> *Burrell v. Phillips*, 1 Gall. 360; *Horton v. Horton*, 2 Cow. 589.

<sup>3</sup> *State v. Kay*, 18 John. 218. But see *People v. Douglass*, *sup.*

<sup>4</sup> *Commonwealth v. McCool*, Virgin. Cases, 271; *McLain v. State*, 10 Yerg. 241.

<sup>5</sup> *McCreary v. Commonwealth*, 29 Penn. St. 323; 3 Whart. C. L. § 3114-3116.

misapprehension, accident or mistake on the part of the jury, and under circumstances to show that such separation could, by no possibility, have resulted to the prejudice of the prisoner.<sup>1</sup>] But the rule prohibiting a separation of a jury is applied with different degrees of stringency in different States, in some of which something more than the act of separating must be shown, to be a cause for setting aside a verdict.<sup>2</sup>

*Discharge of the Jury.* If the term of the court expires while the jury are deliberating, and before they have agreed, they will be discharged as a matter of course.<sup>3</sup>

So, as has hereinbefore been stated, if a jury cannot agree or a juror is suddenly taken sick, or such an event occurs as in the judgment of the Court renders it necessary to discharge a jury before rendering their verdict, it may be done without affecting the right of the prosecution to subject the defendant to a new trial.<sup>4</sup>

But it seems that a jury cannot be discharged in the absence of the prisoner and without his knowledge. If they are, he cannot be subjected to a new trial.<sup>5</sup>

<sup>1</sup> [McKinney v. The People, 2 Gilm. 553; Jumpertz v. The People, 21 Ill. 411; Russell v. The People, 44 Ill. 508; Moore, C. L. §§ 923, *et seq.*]

<sup>2</sup> 3 Whart. C. L. §§ 3118-3122.

<sup>3</sup> Commonwealth v. Purchase, 2 Pick. 525.

<sup>4</sup> Commonwealth v. Purchase, 2 Pick. 524, 525; Wonson v. Queen, L. R. 1, Q. B. 289, 390; 1 Chit. C. L. 635, and Perkins' note.

<sup>5</sup> State v. Wilson, 50 Ind. 487.

*Custody of the Jury.* The stringency of custody and restraint of a jury after they have been charged, is much less than it once was in England, and, as a rule, has been differently applied in the different States. By the English law they were to be kept together in some convenient place, without meat or drink, fire or candle, "which," Coke says, "some books call an imprisonment."<sup>1</sup> In Massachusetts they are allowed fire, light, and reasonable refreshments, and what are such, seems to have been differently held by different courts, according to their discretion.<sup>2</sup>

*Effect of General Verdict of Guilty where some of the Counts are bad.* Questions sometimes arise as to the effect of a general verdict of guilty where there are several counts in an indictment and some of them are bad. In civil cases such a verdict would be bad because the Court could not tell how much of the damages assessed was allowed upon the counts which are bad. But in criminal cases the Court may obviate all the difficulty arising under such a verdict, by rendering judgment and sentence only upon the good counts. And in Massachusetts it is held that the presumption of law in such cases is that judgment has been rendered only upon the good counts, so that error will not lie to reverse it.<sup>3</sup>

<sup>1</sup> Co. Lit. 227b.

<sup>2</sup> Commonwealth v. Purchase, 2 Pick. 525; Commonwealth v. Roby, 12 Pick. 456; Brant v. Fowler, 7 Cow. 562; Wilson v. Abrams, 1 Hill, 207. See Rev. Stat. Ill. 1874, 411, § 435.

<sup>3</sup> 1 Chit. C. L. 640, and Perkins' note; Brown v. Commonwealth, 8 Mass. 64; Josslyn v. Commonwealth, 6 Met. 236.

## IV. PROCEEDINGS SUBSEQUENT TO THE VERDICT.

*Motion for New Trial.* After a verdict has been returned by the jury, if it is in favor of the defendant, he is at once discharged from custody to "go so discharged without day." But if it is that he is guilty, the Court proceeds to render judgment and pronounce sentence upon him, unless some motion or measure to the contrary addressed to the Court is interposed in his behalf. Among these motions is that for a new trial on the ground of some omission, irregularity or mistake in the course of the trial, by which injustice will be done, if the Court do not interpose by giving the defendant a new trial instead of proceeding to pass sentence upon him. This is a matter addressed to the discretion of the Court, and is to be distinguished from those measures by which the Court is called upon to revise the legality of its rulings during the trial by the way of exceptions, or a motion in arrest of judgment for defects in the mode of stating the offense charged, or in the finding of the jury, or error for defect or irregularity in the proceedings or in the judgment in the case.

In England, Courts have not heretofore granted new trials after a conviction for felony or treason. All that they have done is to respite the defendant, to give him time to apply for pardon, which is uniformly done where the Court is satisfied that the conviction is improper. But in cases of misdemeanor there is no question of the right of the Courts to grant new trials. A different rule in respect to the power of Courts to grant new trials in



cases of offenses above misdemeanors, prevails in different States, and the Court of Queen's Bench now grants new trials in certain cases.<sup>1</sup>

By statute in Massachusetts, the Supreme and Superior Courts are clothed with full powers to grant new trials "for any cause for which by law a new trial may be granted, or where it appears to the Court that justice has not been done, and on such terms or conditions as the Court shall direct."<sup>2</sup> And Mr. Wharton shows that the tendency of the Courts of other States is in favor of the exercise of a general power of granting new trials in all cases.<sup>3</sup>

Among the grounds upon which new trials may be granted, are mistakes or misconduct on the part of the jury, that the verdict is against the law or the evidence, or newly discovered evidence, mistakes on the part of the Court, as referring the construction of a written contract to the jury.<sup>4</sup> But as each of these and other grounds depend upon the circumstances of each case, it is not proposed to cite authorities upon the point, since the exercise of the power rests upon the idea that the law allows courts to interpose in this form where they are satisfied that the enforcement of a verdict would work manifest injustice. The objection that a new trial is putting

<sup>1</sup> 1 Chit. C. L. 654, and Perkins' note; 3 Whart. C. L., §§ 3060, 3061.

<sup>2</sup> *Commonwealth v. Green*, 17 Mass. 535; Gen. Stat. Mass. c. 173, § 7.

<sup>3</sup> 3 Wharton, C. L. § 3064-3078. See Rev. Stat. Ill. 1874, 781, § 57.

[<sup>4</sup> By statute in Illinois, the jury is the judge of the law as well as of the facts. Rev. Stat. 1874, 411, § 431.]

the defendant twice in jeopardy, has been considered in a former part of this work.

The power of granting new trials is limited to applications by defendants, and is not extended, as a general proposition, to the prosecution.<sup>1</sup>

*Review upon Exceptions to Rulings of the Judge.* Another form of interposing objection to rendering judgment upon a verdict, is by means of exceptions to the rulings of the judge during the trial in matters of law. In some of the States this is not allowed in criminal cases, while it is recognized in others. It is expressly provided for by statute in Massachusetts, and the mode in which it is done. As the effect is to carry the case to a higher court for adjudication upon the matters raised by the exception, and consequently to cause delay, during which the defendant must be in custody to await decision, provision is made for his recognizing for his appearance at the court to which the case is to be carried, and if he fails to furnish such recognizance he is to remain in prison.<sup>2</sup> If the exceptions are sustained, a new trial is granted; but if overruled, judgment and sentence follow in the same manner as if the exceptions had not been raised.<sup>3</sup>

*Motion in Arrest of Judgment.* Another ob-

<sup>1</sup> 1 Bish. Cr. Proc. § 1101; Rev. Stat. Ill. 1874, 411, § 437.

<sup>2</sup> 1 Chit. C. L. 622, and Perkins' note; Gen. Stat. Mass. c. 115, §§ 7, 8; c. 173, §§ 9, 10. See Rev. Stat. Ill. 1874, 415, § 463.

<sup>3</sup> [For the statutory provisions upon this subject in Illinois, see Rev. Stat. 1874, p. 411, § 437, p. 414, § 458, *et seq.*; Moore, C. L. §§ 1032, *et seq.*, 1037, *et seq.*]

jection to judgment after a verdict has been rendered may be interposed by way of arrest of judgment. This is based upon something apparent upon the record of the proceedings in the case. It is not every objection which might have been made to the insufficiency of the indictment which will be the ground of arrest of judgment after verdict, since the verdict may by implication supply the defects which were at first apparent in the indictment.<sup>1</sup>

It may be stated in general terms that motions in arrest of judgment rest mainly upon the ground that, if all the facts stated in the indictment be true, yet it may be true that the offense charged has not been committed, and therefore no judgment can properly be rendered upon a verdict affirming these facts. And the same would be true if the defendant had pleaded guilty to the indictment.<sup>2</sup>

But now by statute in Massachusetts, as is the case in some other of the States, if one proposes to take advantage of any formal defect in a complaint, indictment or other criminal process, apparent on the face thereof, he must do it by demurrer or motion to quash; and no motion in arrest of judgment shall be allowed for any cause existing before verdict, unless the same affects the jurisdiction of the court.<sup>3</sup>

<sup>1</sup> 3 Whart. C. L. § 343.

<sup>2</sup> 1 Chit. C. L. 663; *Commonwealth v. Hearsey*, 1 Mass. 138; 3 Whart. C. L. § 3043, *et seq.*; Moore, C. L. § 999.

<sup>3</sup> Stat. 1864, c. 250, §§ 2, 3; 1 Bish. Crim. Proc. § 1111, and note; § 114.

[By statute in Illinois, it is provided that "all exceptions which go merely to the form of an indictment, shall be made

As these objections involve questions of law, if they are disallowed it would be a matter of exception in those States where such is a mode of carrying such questions to a Court of the last resort.

*Benefit of Clergy.* The interposing a claim of benefit of clergy between a verdict and the rendering of a judgment thereon, which once prevailed in England and to a limited extent in this country, has been considered in a former part of this work.<sup>1</sup>

*Sentence.* If none of these objections are interposed after a verdict has been returned, the Court proceeds to render judgment and pass sentence upon the defendant. But before doing this in capital cases, the clerk inquires of the prisoner what he has to say why sentence should not be pronounced against him. And if the record does not show that this inquiry was made before pronouncing sentence by the Court, it has been held to be a ground for reversing the judgment.<sup>2</sup>

In rendering judgment and passing sentence, the before trial, and no motion in arrest of judgment, or writ of error, shall be sustained for any matter not affecting the real merits of the offense charged in the indictment." Rev. Stat. 1874, 408, § 411.]

<sup>1</sup> *Ante*, p. 13.

<sup>2</sup> *Dodge v. People*, 4 Neb. 220, [a statutory requirement, however, in this case]; *Dougherty v. Commonwealth*, 69 Penn. St. 291; *McCue v. Commonwealth*, 78 Penn. St. 185.

[If there is no other error, the sentence only will be reversed, and not the trial and conviction; and the case will be remanded and an opportunity afforded the prisoner to plead in bar to the sentence. *McCue v. Commonwealth*; *Dodge v. The People*, *supra*; *Kelly v. The State*, 3 Sm. & M. 518. See, however, 1 Bish. Cr. Proc. § 1201, and cases cited.]

Courts are, in some cases, restricted within defined limits as to power and degree; in others, much greater latitude is allowed in the extent of the punishment to be inflicted. Thus, it was once imperative upon the English courts in passing sentence upon traitors, to specify, in terms, the brutal barbarities which entered into a judgment upon conviction of treason, even to the cutting down and disemboweling the offender while yet alive, which was not dispensed with until 1814.<sup>1</sup> In regard to most offenses, the Court is at liberty to exercise considerable discretion in imposing sentences, always as to offenses at common law, and usually as to punishments prescribed by statute.<sup>2</sup>

In Massachusetts the Constitution, like that of the United States, forbids the infliction of cruel and unusual punishments.<sup>3</sup> This is usually guarded by having the punishment to be imposed for the commission of any defined crime prescribed by the statute declaring the crime, in which there is ordinarily much latitude extended to the Court as to the extent and degree of severity of the sentence to be imposed in any given case. And in respect to cases where no such sentence is prescribed, there is

<sup>1</sup> 1 Chit. C. L. 702.

<sup>2</sup> 1 Chit. C. L. 710

[As to when the penalty is to be determined by the jury, and when by Court in Illinois, see Rev. Stat. 1874, 412; § 444, *et seq.*; Moore, C. L. §§ 975, 1003.]

<sup>3</sup> Mass. Bill of Rights, Art. 26; U. S. Constitution, 8th Amendment.

[Cooley's Const. Lim. 328. See, also, Rev. Stat. Ill. 1874, 768, § 37; Const. Ill. Art. 2, § 11.]

a provision that "in any case of legal conviction where no punishment is provided by statute, the Court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution."<sup>1</sup>

In most of the States the system of corporal punishments which once prevailed at common law, has been abrogated by statute, though retained in some one or two of them. Instead of these, that of penitentiary confinement to hard labor has been substituted, and is in general use.<sup>2</sup>

Among the consequences of a conviction and sentence for a capital offense at common law, were attainder and corruption of blood. These are unknown to the law of Massachusetts, and a conviction of treason, even under the law of the United States, can only work a corruption of blood or forfeiture during the life of the party so convicted.<sup>3</sup>

If a prisoner is sentenced to imprisonment for a specified time, and a second sentence is passed upon him for another offense, it is provided in pronouncing the sentence that it shall take effect when the former sentence shall have expired.<sup>4</sup> And if, after having pronounced sentence upon a prisoner, the

<sup>1</sup> Gen. St. Mass. c. 174, § 1.

[See 2 Comp. Laws, Mich. 1871, § 7824; *McNamee v. The People*, 31 Mich. 474.]

<sup>2</sup> See Rev. Stat. Ill., 1874, 768, § 37.

<sup>3</sup> 1 Chit. C. L. 723; U. S. Const. Art. 3, § 3.

[In Illinois "no conviction shall work corruption of blood or forfeiture of estate." Const. Art. 2, § 11.]

<sup>4</sup> 1 Bish. Cr. Proc. § 1139, and cases cited.

judge shall become satisfied during the term at which it is rendered and before it has begun to be carried into effect, that it should be increased or diminished in severity, it is competent for him to so far change the sentence in that respect.<sup>1</sup>

Sometimes the statute provides an alternative sentence as a fine or imprisonment, and in such case it is competent for the judge to sentence the defendant to pay a fine, or in default thereof to be imprisoned.<sup>2</sup>

*Writ of Error.* If a judgment has been rendered and sentence pronounced, there will still remain one more process to which the defendant may resort to reverse the same, if it shall be found to be erroneous, and that is a writ of error. This may be sued out returnable to a court of competent jurisdiction, setting forth the grounds upon which it is assumed that the judgment is erroneous, and that the same ought to be reversed. It rests alone upon what appears in the record of the case, and may generally reach such defects in the indictment as would be fatal on general demurrer or on motion in arrest of judgment.<sup>3</sup> In Massachusetts if there be an

<sup>1</sup> 1 Bish. Cr. Proc. § 1123, and cases cited. See *The People v. Whitson*, 74 Ill. 20, and cases cited.

<sup>2</sup> 1 Bish. Cr. Proc. § 1137.

<sup>3</sup> By statute in Illinois, "exceptions may be taken in criminal cases, and bills of exceptions shall be signed and sealed by the judge, and entered of record, and error may be assigned thereon by the defendant the same as in civil cases: Provided, that in no criminal case shall the people be allowed an appeal, writ of error or new trial." Rev. Stat. 1874, 411, § 437; Moore, C. L. § 1032. A criminal case cannot in Illinois be brought to

error in the matter of the sentence, it is competent for the Court which shall reverse the judgment on account thereof to render such judgment in its stead as should have been rendered, or it may remand the case for that purpose to the Court before which the conviction was had; and a like law prevails in some other of the States.<sup>1</sup>

The adoption of any of the measures above mentioned by way of exceptions or motion for a new trial, though unsuccessful, is no bar to the defendant's remedy by writ of error.<sup>2</sup>

At common law, if the sentence did not conform to law, the judgment would be reversed on error, although it was more favorable for the defendant than the one prescribed by law; as where the sentence was of transportation for a crime capital in its nature.<sup>3</sup>

#### V. CRIMINAL PROCEDURE IN THE FEDERAL COURTS.

This brief treatise would obviously be defective without some reference to the criminal procedure in use under the laws of the United States. It is now well settled that the courts of the United States have no criminal jurisdiction beyond what is expressly given them by statute. Until, therefore, an act has been declared criminal by Congress, these

the Supreme Court except by writ of error. *Mohler v. The People*, 24 Ill. 26.]

<sup>1</sup> 1 Bish. Cr. Proc. §§ 1196, 1202; Gen. Stat. Mass. c. 146, § 16; 1 Chit. C. L. 747. [See *ante*, p. 260, note 2; Rev. Stat. Ill. 1874, 874, § 82; *Wilmons v. Bank of Illinois*, 1 Gilm. 667.]

<sup>2</sup> Gen. Stat. Mass. c. 173, § 10.

<sup>3</sup> *King v. Bourne*, 7 Ad. & El. 58.



courts have no cognizance of it. But the course of procedure by which such criminal act is prosecuted and tried is borrowed from the common law, except when expressly modified by the constitution or statutes made under it.<sup>1</sup>

The usual officers by whom complaints may be heard, warrants issued, and preliminary hearings had, are what are called commissioners.<sup>2</sup>

The warrants which issue from these commissioners are served by the marshal or his deputy, and the places to which commitments are made are generally the jails of the several States, where the use of the same has been granted by the States. And if any State has failed to make such a grant, the marshal is authorized to provide a suitable place for the purpose.

Where the offense charged is committed on the high seas without the jurisdiction of any State, the place of trial is within the district into which the defendant is first brought, or is apprehended.<sup>3</sup>

[Where the offense is a capital one, it is to be tried in the county where it was committed, where that can be done without great inconvenience.]<sup>4</sup>

Prisoners capitally charged [as well as those charged with crimes not capital] have the right of challenging jurors peremptorily and for cause, [the number of peremptory challenges allowed being

<sup>1</sup> Conklin's Treatise (5th ed.), 181, 596; 1 Abb. U. S. Pr. \*406.

<sup>2</sup> Act Sept. 19, 1850; 9 U. S. Laws, 462.

<sup>3</sup> Rev. Stat. U. S. p. 138, § 730.

<sup>4</sup> Rev. Stat. U. S. p. 138, § 729.

regulated by statute.]<sup>1</sup> The qualifications of jurors in the United States Courts are [the same as those] fixed by the laws of the States in which the courts are held.<sup>2</sup>

The Courts of the United States adopt the English rule as to granting new trials in criminal cases, even upon the defendant's own motion, on the ground that it is putting the defendant twice in jeopardy. But they feel at liberty to discharge a jury and put the defendant again upon trial if the jury are unable to agree upon a verdict.<sup>3</sup>

In the matter of punishment, as has already been stated, no attainder for treason can work corruption of blood except during the life of the person who has been convicted, nor can it work a forfeiture of goods or estate. Corporal punishments by whipping or the pillory were not abolished until 1839.<sup>4</sup>

Where the sentence is imprisonment with hard labor, it is carried into effect in the penitentiary, jail or house of correction of some State, the use of which has been granted by the State. And, while

<sup>1</sup> Rev. Stat. U. S. p. 152, § 819.

<sup>2</sup> [Rev. Stat. U. S. p. 149, § 800. This section does not, however, apply to Pennsylvania.]

<sup>3</sup> Conklin's Treatise (5th ed.), 641, 642, citing U. S. v. Gilbert, 2 Sum. 19.

[It is believed that the clear weight of authority is opposed to the case of the U. S. v. Gilbert, *supra*, and that after a verdict of conviction the Court may, for cause shown, set it aside and grant a new trial, and this in capital cases as well those of a lower degree. U. S. v. Keen, 1 McLean, 429; U. S. v. Conner, 3 id. 573; U. S. v. Macomb, 5 id. 286; U. S. v. Harding, 1 Wall. Jr. 127. See, also, 2 Abb. U. S. Pr. (3rd ed.) \*193.]

<sup>4</sup> 5 U. S. Stat. at Large, 322.

undergoing such imprisonment, the prisoner is to be subject to the same control and discipline as the other prisoners committed to the same prison.

#### VI. IMPEACHMENT.

There remains in all cases the power of pardon by which persons convicted of offenses may be relieved from the consequences of a conviction, in whole or in part, of which it is unnecessary to speak at large. And it only remains to notice, in the briefest manner, a mode of trial and punishment which, under the Constitution and laws of the United States, or the several States, is provided for offenses committed by public officers, known as impeachments. These are in the nature of indictments wherein, by the Constitution and laws of the United States, the House of Representatives present charges against such officer for malversation in office, to the Senate, to be tried by them while sitting as a court. If the President is the subject of charge, the Chief Justice of the United States is the presiding officer. And in all cases it requires the approval of two-thirds of the members of the court to work a conviction<sup>1</sup>

In England, though it has long been disused, it is competent for such a court, under such a process, to try charges of felony or misdemeanor, and to impose any punishment, upon conviction thereof, known to the common law for like offenses. But in this country, the offenses of which such courts take cognizance are not well defined, though the punish-

<sup>1</sup> U. S. Const. Art. 1, § 3.

ments which they can impose are limited to the removal from office, and the incapacitating of the offender from holding office thereafter. Nor does a conviction by such a court operate as a bar to an indictment in a court of common law for the same offense.<sup>1</sup> The Constitution defines who are the subjects of impeachment, viz: "the President, Vice President, and all civil officers of the United States," and they "shall be removed from office on impeachment for, and conviction of, treason, bribery and other high crimes and misdemeanors."<sup>1</sup> In the trial of Belknap, who had resigned office before impeachment proceedings had been commenced, the Senate were divided upon the question whether an offender was answerable to such a court after his resignation had been accepted. There are few authorities to be cited upon the questions growing out of the doctrine of impeachment, beyond the Constitution itself, though Prof. Dwight, of New York, and Judge Lawrence, of Ohio, published learned and elaborate articles upon the subject which are cited below, and to which reference may be had.<sup>3</sup>

<sup>1</sup> U. S. Const. Art. 1, § 3.

<sup>2</sup> U. S. Const. Art. 2, § 4.

<sup>3</sup> 6 Am. L. Reg. (N. S.) 257, 282, 641.

# INDEX.

---

	PAGE
ABATEMENT,	
plea in, . . . . .	128, 141
ABBREVIATIONS,	
in indictments, . . . . .	138
ACCESSORIES,	
kinds of defined, . . . . .	101
of what crimes predicable, . . . . .	12, 100
second in a duel, . . . . .	78
charging in indictment, . . . . .	162
when to be tried, . . . . .	162
evidence in indictment for, . . . . .	163
ACCOMPLICES, <i>testimony of.</i> See <i>Evidence.</i>	
AFFRAY, . . . . .	25
"AGAINST THE FORM OF THE STATUTE," . . . . .	168
"ALIAS DICTUS,"	
use of in indictments, . . . . .	143
AMENDMENTS, . . . . .	170
ARRAIGNMENT, . . . . .	127, 191
ARREST, . . . . .	174
witnesses privileged from, . . . . .	241
ARREST OF JUDGMENT, . . . . .	132, 258
ARSON, . . . . .	25
ASSAULT AND BATTERY, . . . . .	27
ATHEISTS,	
competency of as witnesses, . . . . .	233
ATTAINDER, . . . . .	262
ATTEMPTS, . . . . .	102

BAIL. See <i>Crimes</i> .	
rights and remedies of, . . . . .	172
BARRATRY, . . . . .	28
BATTERY, . . . . .	27
BENEFIT OF CLERGY, . . . . .	13, 260
BRIBERY, . . . . .	33
BURGLARY, . . . . .	33
CAPIAS, . . . . .	173
CERTAINTY,	
degrees of, . . . . .	136
CHAMPERTY, . . . . .	28, 29
CHEATS, . . . . .	37, 47
CODE. See <i>Criminal Code</i> .	
COMMON LAW. See <i>Crimes</i> .	
COMPLAINTS BEFORE MAGISTRATES, . . . .	104
COPOUNDING OFFENSES,	
when allowed, . . . . .	12
CONFESSIONS. See <i>Evidence</i> .	
CONSPIRACY, . . . . .	41
CONTEMPTS, . . . . .	246
CORPORATIONS. See <i>Crimes</i> .	
CORPUS DELICTI,	
evidence of, . . . . .	163
must be proved, . . . . .	221
COUNSEL,	
right of respondent to be heard by, . . .	16, 187
not allowed to disclose confidential communications,	237
COUNTERFEITING, . . . . .	44
CRIMES. See the <i>Specific Crimes</i> .	
distinction between public and private wrongs,	1, 2, 3
general principles of criminal law, . . .	1 <i>et seq.</i>
violation of duty, &c., created by statute, . . .	6
what necessary to make an act a crime, . . .	6
act and intent, . . . . .	6
<i>mala in se</i> and <i>mala prohibita</i> , . . . . .	8
at common law and by statute, . . . . .	8
common law crimes not indictable in the Federal	
Courts, . . . . .	9, 264

CRIMES—*Continued.*

common law when applicable in supplying defects	
and definitions, . . . . .	10
felonies and misdemeanors defined, . . . . .	10
bailable and not bailable, . . . . .	17
criminal capacity, . . . . .	7, 19
infants, . . . . .	19
insanity, . . . . .	20
intoxication, . . . . .	22
coverture, . . . . .	22
corporations, . . . . .	23
malice, . . . . .	24
CRIMINAL CODES, . . . . .	15

## DEAF AND DUMB PERSONS,

pleas by and trial of, . . . . .	130, 194
----------------------------------	----------

DEMURRER, . . . . .	128, 192
---------------------	----------

## DUEL,

killing a person in, murder, . . . . .	78
--	----

DWELLING. See *House*.DYING DECLARATIONS. See *Evidence*.

EMBEZZLEMENT, . . . . .	47
-------------------------	----

## ENGLISH LANGUAGE,

use of in law proceedings, . . . . .	16, 17
--------------------------------------	--------

ERROR, WRIT OF. See *Procedure*.EVIDENCE. See *Accessories; Witnesses*.

number of witnesses required to convict, . . . . .	222
must be given under oath, . . . . .	223
dying declarations, . . . . .	224
confessions, . . . . .	224, 227
state's evidence, . . . . .	225
of character, . . . . .	227
written instruments, . . . . .	228
handwriting, . . . . .	229
experts as to handwriting, . . . . .	229
must be given orally—depositions, . . . . .	231

## EXAMINATION,

of person charged with crime, . . . . .	112, 115
---	----------

EXCEPTIONS,	
reference to in indictment upon a statute,	167
FALSE PRETENSES,	37
indictments for,	134
FELONIES. See <i>Crimes</i> .	
“FELONIOUSLY,”	
when to be used in an indictment.	II, 134, 137
FORCIBLE ENTRY AND DETAINER,	51
FORGERY,	53
FORMER CONVICTION OR ACQUITTAL,	
plea of,	193, 195
GRAND JURIES,	120
GUILTY KNOWLEDGE,	
allegation of,	153
HOMICIDE. See <i>Murder, Manslaughter</i> .	
kinds of,	73
HOUSE,	
meaning of term in definition of arson.	25
burglary,	34
IGNORANCE,	
of law,	7
fact,	7
IMPEACHMENT,	267
INDICTMENTS,	
right of prisoner to copy of,	187
and proceedings thereon prior to the trial,	118
requisites of,	133
separate counts,	153
joinder of offenses,	153
upon statutes,	164
matters of description and surplusage,	169
INFANTS. See <i>Crimes</i> .	
as witnesses,	232
INFORMATIONS,	119
INITIALS,	143



INSANITY. See *Crimes*.

insane persons as witnesses, . . . . . 232

INTENT,

must concur with the act, . . . . . 6

presumption as to, . . . . . 7

allegation of, . . . . . 147

INTOXICATION. See *Crimes*.

JOINDER OF DEFENDANTS, . . . . . 160

JOINDER OF OFFENSES, . . . . . 153, 157

conviction of misdemeanor upon indictment for

felony, . . . . . 159

JUDGMENT. See *Sentence*.

where there are several counts, . . . . . 156

where one count is bad, . . . . . 157

*respondeat ouster*, . . . . . 192

JURY. See *Grand Jury; Procedure*.

right to render a general verdict in prosecutions for

libel, . . . . . 70, 72, 244

as judges of the law, . . . . . 218, 244

right of defendant to list of jurors, . . . . . 190

impaneling jury—challenges, . . . . . 210, 265

oath of, . . . . . 217

polling, . . . . . 250

custody of—effect of separation, . . . . . 252, 255

discharge of, . . . . . 254

JUSTICES OF THE PEACE,

jurisdiction to receive complaints, etc., . . . . . 105

LARCENY, . . . . . 56

distinguished from embezzlement, . . . . . 47

LATIN LANGUAGE,

English substituted for in indictments, . . . . . 16, 138

LIBEL, . . . . . 66

allegation of in indictment, . . . . . 148

right of jury to render a general verdict, . . . . . 70, 72, 245

LIMITATIONS, STATUTE OF, . . . . . 78, 102

LOCALITY OF CRIME. See *Venue*.

of being an accessory, . . . . . 162

MAINTENANCE, . . . . .	28, 31
MALICE. See <i>Crimes</i> .	
in publication of a libel, . . . . .	68
murder, . . . . .	76, 78
MALICIOUS MISCHIEF, . . . . .	72
MANSLAUGHTER, . . . . .	80
MARRIED WOMEN.	
criminal capacity of, . . . . .	22
competency of as witnesses, . . . . .	234
MISDEMEANORS. See <i>Crimes</i> .	
MISNOMER,	
plea of, . . . . .	128, 142
MITTIMUS,	
pending a preliminary examination, . . . . .	111
upon sentence by magistrate, etc., . . . . .	114
MURDER, . . . . .	74
NAME,	
of defendant in indictment, . . . . .	141
of person injured, . . . . .	143, 144
NEW TRIAL. See <i>Procedure</i> .	
NOLO CONTENDERE, . . . . .	131
NOL. PROS., . . . . .	159, 196, 204
NUISANCE, . . . . .	85
NUMBER,	
allegations of, . . . . .	149
ONCE IN JEOPARDY, . . . . .	195
PARDON, . . . . .	203
PERJURY, . . . . .	88
indictment for, . . . . .	148
subornation of, . . . . .	92
number of witnesses required to convict of, . . . . .	222
PLACE. See <i>Venue</i> .	
allegations of as to traversable facts, . . . . .	144
PLEA, . . . . .	127, 191
of misnomer, . . . . .	128
in abatement, . . . . .	128

PLEA.—*Continued.*

not guilty, . . . . .	129, 205
guilty, . . . . .	131, 132, 194
<i>nolo contendere</i> , . . . . .	131
of former conviction or acquittal, . . . . .	193
repleader, . . . . .	194

PRIVILEGED COMMUNICATIONS, . . . . .	72
counsel not allowed to disclose, as witnesses, . . . . .	237
privilege does not extend to priests or physicians, . . . . .	239

## PROCEDURE,

when public process may be made to serve the cause of private redress, . . . . .	2
modes of originating criminal process, . . . . .	104
by complaint, . . . . .	104
preliminary examination, . . . . .	112, 115
indictments and informations, and proceedings thereon prior to trial, . . . . .	118
calling defendant to appear and answer indictment, . . . . .	171
arraignment and plea, . . . . .	127, 191
forfeiture of recognizance, . . . . .	170
remedy of bail, . . . . .	172
<i>capias</i> , . . . . .	173
arrest, . . . . .	174
requisitions—extradition. . . . .	185
right of prisoner to copy of indictment, and aid of counsel, . . . . .	187
call witnesses, . . . . .	189
to be present, . . . . .	190
list of jurors and witnesses, . . . . .	190
<i>nol. pros.</i> , . . . . .	204
trial, what issues to be tried first, . . . . .	193
mode of, . . . . .	193
and its incidents, . . . . .	205
separate trials, . . . . .	205
election upon which count to proceed, . . . . .	209
impaneling jury—challenges, . . . . .	210
oath of jury, . . . . .	217
jury as judges of the law, . . . . .	218

PROCEDURE.—*Continued.*

talesmen,	219
reading indictment,	219
view,	219
proceedings upon the trial,	220
criminal evidence,	221, <i>et seq.</i>
argument of counsel,	221, 244
charge of court,	248
right of jury to render a general ver-	
dict,	70, 72, 218, 244
general and special verdicts,	245
rendition of verdict,	250
publication of proceedings—contempts,	246
custody of jury—effect of separation,	252, 255
discharge of jury,	254
effect of general verdict of guilty where some	
of the counts are bad,	255
proceedings subsequent to the verdict,	256
motion for new trial,	256
exceptions,	258
motion in arrest of judgment,	258
benefit of clergy,	13, 260
sentence,	113, 133, 158, 260
writ of error,	263
pardon,	203
proceedings in the United States Courts,	264
by impeachment,	267
PROPERTY,	
allegation of,	152
PROSECUTOR,	
no public prosecutor in England,	5, 123
<i>contra</i> in United States,	6, 124
when public prosecutor allowed assistance of private	
counsel,	6
PROVISO,	
reference to, in indictments upon statutes,	167
“PURPORT,”	
meaning of,	147, 149

QUANTITY,	
allegations of, . . . . .	149
RECEIVING STOLEN GOODS, . . . .	66, 163
RECOGNIZANCE,	
defined, . . . . .	117
by defendant to appear and answer, . . . .	116
by witnesses to appear and testify, . . . .	116
forfeiture of, . . . . .	172
RIOTS, . . . . .	93
ROBBERY, . . . . .	96
ROUTS, . . . . .	93
SCIRE FACIAS,	
upon recognizance, . . . . .	172
SELF DEFENSE, . . . . .	81
SENTENCE. See <i>Procedure</i> .	
in cases cognizable by magistrates, . . . .	113
upon plea of guilty, . . . . .	133
cumulative sentences, . . . . .	158, 262
SEPARATE COURTS, . . . . .	153
STANDING MUTE, . . . . .	130
STATUTES. See <i>Crimes</i> .	
SUBORNATION OF PERJURY, . . . . .	92
SURPLUSAGE,	
in indictments, . . . . .	169
"TENOR,"	
meaning of, . . . . .	147, 149
TIME,	
allegation of as to traversable facts, . . . .	144
TREASON, . . . . .	98
number of witnesses required to convict of, . . . .	222
TRIAL. See <i>Procedure</i> .	
UNLAWFUL ASSEMBLIES, . . . . .	93
VALUE,	
allegations of, . . . . .	152

VARIANCE, . . . . .	150
VENIRE FACIAS, . . . . .	121, 211
VERDICT. See <i>Procedure</i> .	
VIEW. See <i>Procedure</i> .	
VENUE.	
locality of crime as respects the place of prosecution therefor, . . . . .	63, 77, 109, 138
change of, . . . . .	140
VI ET ARMIS,	
allegation of, . . . . .	153
WEREGILDS, . . . . .	4
"WHEREAS,"	
use of in indictments, . . . . .	135
WITNESSES,	
right of respondent to call, . . . . .	16, 189
list of, . . . . .	190
be confronted by, . . . . .	231
who may be, . . . . .	231
competency of defendants as, . . . . .	208, 235
number required to sustain a charge, . . . . .	222
impeachment of, . . . . .	228
how sworn, . . . . .	234
attendance of, how compelled, . . . . .	240
privileged from arrest, . . . . .	241
separate examination of, . . . . .	242
need not criminate themselves, . . . . .	242

















